# Petition

81-1114

No. 80-

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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ALEXANDER L. STEVAS,
CLERK

STATE OF ILLINOIS,

PETITIONER,

vs.

ABBOTT & ASSOCIATES, INC., ET AL.,

RESPONDENTS.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Printed by the Authority of the State of Illinois — 12-15-81

## QUESTION PRESENTED

**WHETHER §4F(b) OF THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT PERMITS THE ATTORNEY GENERAL OF ILLINOIS ACCESS TO GRAND JURY MATERIALS CONTAINED WITHIN THE "INVESTIGATIVE FILES OR OTHER MATERIALS" OF THE UNITED STATES DEPARTMENT OF JUSTICE, WITHOUT A SHOWING OF PARTICULARIZED NEED**

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STATE OF ILLINOIS,

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RESPONDENTS.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on September 16, 1981.

## OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are reported at 659 F.2d 800 (7th Cir. 1981) and appear as Appendix A hereto. The decision of the district court is reported in 1980-81 Trade Cases (CCH) ¶63,771 at 78,103

(N.D.Ill. 1981) and appears as Appendix F hereto. Various orders of the court of appeals and district court are also appended hereto.

## PARTIES BELOW

Petitioner is the State of Illinois, by its Attorney General, Tyrone C. Fahner. Certain respondents are corporations and individuals named as defendants in two federal treble damage antitrust actions brought by the State of Illinois which are presently pending in the Northern District of Illinois. Other respondents are corporations and individuals who either submitted documents or provided testimony to the August 1977 Grand Jury of the Northern District of Illinois but who were not named as defendants in the treble damage actions. All of these respondents have opposed disclosure of grand jury materials to the State of Illinois.

The United States of America is also a respondent. The United States has consistently supported the Illinois Attorney General's petition for disclosure.

The Attorney General of Illinois does not know the exact number and identity of the respondents. Because of the grand jury secrecy questions presented by this case, both the district court and the court of appeals ordered their respective dockets for this case suppressed and permitted respondents to file their appearances under seal. *See* Appendices E (¶10) and G.[1] The number of respondents in the district court may be

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[1] The following corporate respondents filed public appearances in the court of appeals: Abbott & Associates, Inc., Admiral Heating & Ventilating, Inc., Anderson & Litwack Co., Bellis-Hanley, Inc., Borg, Inc., Byness, Inc., Climatemp, Inc., Commonwealth Plumbing & Heating Co., C.W. Johnson, Inc., Economy Mechanical Industries, Inc., F.E.

*continued on next page*

estimated from the fact that the State was required to serve upon the clerk of court 152 copies of all papers filed with the district court. Service upon respondents was then made by the clerk. A similar procedure was adopted in the court of appeals, but only 40 copies of papers and briefs were required to be filed with the clerk of the Seventh Circuit. *See* Appendix E (¶14).

## JURISDICTION

The judgment of the court of appeals was entered on September 16, 1981. (App. B). On September 30, 1981, the court of appeals modified its opinion to indicate that the opinion had been circulated among all judges of the court in regular active service and that no judge favored a rehearing *en banc* on the question of the Seventh Circuit's declining to

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Moran, Inc., Gallaher & Speck, Gideon Engineering, Inc., Grigus, Inc., Hans Jenson & Sons, Inc., Ideal Heating, Inc., Illinois Heating & Ventilating Co., Inland Heating & Air Conditioning Co., Mehring & Hanson Wendt, Inc., Moto Heating, Ventilating, Air Conditioning Corp., The Narowetz Co., National Heat & Power Co., Inc., Northern Plumbing & Heating Co., Northwestern Industrial Piping, Inc., Phillips, Getschow Co., Piping Systems, Inc., Reliable Sheet Metal Works, Inc., Voris, Inc., Windsor Heating Co., W. Wanzenberg & Co., Zack Company.

The following individual respondents filed public appearances in the court of appeals: Eugene Abbott, James Anderson, Stanley B. Bellis, James Berg, Elmer Bruksch, Victor Comforte, James Connor, Robert E. Curran, Dennis Dams, Robert Dannenberg, Harold English, Melvin Fakter, Lee E. Getschow, Gideon Goldschmidt, Charles Howard, Robert H. Jensen, Sr., Joseph S. Kearney, Sr., Joseph S. Kearney, Jr., Gerald A. Kelly, Lawrence Krueger, Robert Lawinger, Jr., Ronald Litt, Mid-City National Bank (Executor of the Estate of Harvey E. Anderson), Robert C. Moon, Owen A. Moran, Howard Salzman, Clemens E. Sharp, Edward Usher, Henry C. Wanzenberg, Richard Wise, Arthur Wyco.

follow the decisions of the Fourth and Ninth Circuits. (App. C). The mandate of the court of appeals was stayed by order of November 5, 1981. (App. D). This petition for certiorari was timely filed within 90 days of the entry of judgment, pursuant to 28 U.S.C. §2101(c). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATUTE AND RULE INVOLVED

Hart-Scott-Rodino Antitrust Improvements Act of 1976, Title III, §4F (15 U.S.C. §15f):

> (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under sections 12 to 27 of this title based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.
>
> (b) To assist a State attorney general in evaluating the notice or in bringing any action under sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under sections 12 to 27 of this title.

Rule 6(e) (2) (C), Federal Rules of Criminal Procedure, provides in pertinent part:

> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made:
>
> > (i) when so directed by a court preliminarily to or in connection with a judicial proceeding . . .

> If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

## STATEMENT OF THE CASE

### A. The Federal Criminal Proceedings

In December, 1976, the Antitrust Division of the United States Department of Justice began an investigation before a grand jury in the Southern District of Illinois concerning possible violations of the federal criminal laws by persons in the mechanical construction industry in the State of Illinois. This investigation was transferred and continued before a grand jury in the Northern District of Illinois in August, 1977. Pursuant to subpoena, numerous documents were produced and many witnesses testified before the grand jury. During the course of the proceedings in the Northern District, the Antitrust Division determined that there were actually two separate conspiracies under investigation: one involving the sheet metal construction trade, the other involving the piping construction trade.

On June 12, 1978, the sheet metal investigation concluded with the return of a 13-count indictment, *United States v. Climatemp, Inc., et al.*, 78 CR 388 (N.D.Ill.), charging 19 corporations, 13 individuals and a labor union with conspiring to rig bids on public sheet metal projects in the Chicago area in violation of the Sherman Act, 15 U.S.C. §1. The indictment also charged mail fraud violations. 18 U.S.C. §1341. The bill of particulars indicated that at least 80 building projects were subject to the conspiracy.

On January 31, 1979, the piping investigation was concluded with the return of two single count indictments, *United*

*States v. S. J. Reynolds Co., Inc., et al.*, 79 CR 66 (N.D.Ill.) and *United States v. Borg, Inc., et al.*, 79 CR 67 (N.D.Ill.), charging violations of §1 of the Sherman Act through participation in a conspiracy to rig bids on certain public and private piping construction projects in the Chicago area. The indictments charged 21 corporations and six individuals with violations of the Sherman Act. The bill of particulars indicated that at least 108 projects were subject to the conspiracy.

Of the 59 defendants indicted in the three cases, all but nine were convicted on pleas of *nolo contendere* and sentenced. Of the nine defendants who stood trial, four were convicted and sentenced.[2]

All proceedings in the criminal cases have been terminated. The United States has indicated that it does not intend to take any further action based upon information developed in either the sheet metal or piping investigations.

### B. The State of Illinois' § 4F(b) Request and Treble Damage Actions

On October 17, 1978, after receiving notice from the United States Department of Justice of the *Climatemp* indictment pursuant to 15 U.S.C. §15f(a), the Antitrust Division of the Illinois Attorney General's office requested from the United States, pursuant to 15 U.S.C. §15f(b) ["§4F(b)"], all "investigative files or other materials" relating to the conspiracy charged in the indictment. In response, the United States provided the State with 18 pages of staff memoranda. None of these materials dealt specifically with the grand jury investigation in the Northern District of Illinois. The United

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[2] During the course of the criminal proceedings, grand jury transcripts and documents were disclosed to numerous defendants and witnesses.

States indicated that all other materials within the scope of the State's §4F(b) request were grand jury materials subject to the provisions of Rule 6(e), Fed.R.Crim.P. The Department of Justice indicated its willingness to support the State's application for a court order releasing these materials. No additional information was provided to the State in response to its similar request with respect to the *Borg-Reynolds* cases.

On November 21, 1979 and December 14, 1979, the State of Illinois filed two class action lawsuits under §§4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, on behalf of itself, the Chicago Board of Education, and all other public entities similarly situated. *State of Illinois v. Climatemp, Inc., et al.*, 79 C 4898 (N.D.Ill.); *State of Illinois v. Borg, Inc., et al.*, 79 C 5253 (N.D.Ill.). A total of 86 defendants, including all those indicted in the criminal cases, were named in the civil suits. The complaint in *Climatemp* alleges a bid-rigging and price-fixing conspiracy on the sheet metal phase of Chicago area public building projects from 1963 to at least 1976. The *Borg* complaint alleges a similar conspiracy on the piping phase of Chicago area building projects from 1956 to at least 1977.

The conspiracies alleged in both cases are believed to have affected hundreds of public construction projects. The State of Illinois is attempting to recover damages on behalf of well over one hundred different public entities known thus far to have sustained injury.

### C. The Proceedings Below

On January 31, 1980, the State of Illinois petitioned the district court for disclosure of grand jury materials pursuant to §4F(b) and Rule 6(e), Fed.R.Crim.P. On January 7, 1981, Chief Judge James B. Parsons of the Northern District of

Illinois denied the petition of the State.[3] The district judge also denied the Rule 6(e) petitions of various private parties who had instituted antitrust actions similar to the State's. The court concluded that "Section 4F(b) does not apply to materials acquired by and belonging to the grand jury . . . ," (31a) and required all petitioners, including the State of Illinois, to demonstrate a particularized need for disclosure of the requested materials.

On February 6, 1981, the State of Illinois appealed from that portion of the district court's order which denied the Illinois Attorney General access to grand jury materials under 4F(b). (26a-35a). The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. §1291. The private parties did not appeal.

On September 16, 1981, the United States Court of Appeals for the Seventh Circuit affirmed by a 2-1 vote. The court of appeals questioned whether grand jury materials were within the "investigative files or other materials" language of §4F(b), 659 F.2d at 802 (5a), and, in any event, concluded that the statute did not dispense with a showing of particularized need on the part of the State of Illinois. 659 F.2d at 808 (16a). The Seventh Circuit explicitly declined to follow the decisions of the Fourth and Ninth Circuits in *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), and *United States v. B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980), which had allowed state attorneys general access to grand jury materials under §4F(b) and Rule 6(e) without a showing of particularized need. 659 F.2d at 802 (4a). Judge East filed a dissenting opinion, indicating that *Colonial Chevrolet* and *B.F.*

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[3] Local Rule 1.04(e) (N.D.Ill.) provides that grand jury materials can only be released on the order of the Chief Judge. A separate proceeding was instituted by Chief Judge Parsons for purposes of the State's petition. (App. G).

*Goodrich* had correctly interpreted the statute. 659 F.2d at 808-809 (16a-18a).

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISIONS BELOW ARE IN DIRECT AND TOTAL CONFLICT WITH DECISIONS OF THE FOURTH AND NINTH CIRCUITS HOLDING THAT SECTION 4F(b) AUTHORIZES DISCLOSURE OF FEDERAL GRAND JURY MATERIALS TO STATE ATTORNEYS GENERAL WITHOUT A SHOWING OF PARTICULARIZED NEED

The only issue in this case is the proper construction of §4F(b) of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §15f(b). Section 4F(b) mandates that "investigative files or other materials" generated by federal antitrust investigations should be made available, "to the extent permitted by law," to state attorneys general engaged in antitrust enforcement activities. In *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), and *United States v. B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980), the Fourth and Ninth Circuits held that a state attorney general proceeding under the authority of §4F(b) is to be permitted access to grand jury materials contained in the "investigative files or other materials" of the United States Department of Justice without a demonstration of particularized need. This is the same result reached by numerous district courts that have considered this question. *See In re Application of New Jersey for Grand Jury Records, U.S. D.O.J. File No. 6-23-45*, Misc. No. 10,597 (C.D.Cal. 10/23/81); *Arizona v. United Dairymen of Arizona*, No. 80-245 PHXCAM (D.Ariz. 7/20/81), *appeal pending*, No. 81-5643 (9th Cir.); *In re*

*Grand Jury Investigation of Armored Car Industry*, 1981-1 Trade Cases (CCH) ¶64,182 at 73,630 (N.D.Ga.), *stipulation to dismiss appeal filed*, No. 81-7665 (11th Cir. 10/9/81); *In re Grand Jury Proceedings*, Misc. No. 1331 (N.D.Tex. 1/22/81), *appeal pending*, No. 81-1059 (5th Cir.); *United States v. Cargo Gasoline Co.*, No. 79-124-Cr-J-B (M.D.Fla. 12/8/80, 12/24/80, 1/29/81, 2/11/81), *appeal dismissed sub. nom., United States v. Star Service & Petroleum Co.*, No. 81-5128 (5th Cir. 1981); *United States v. Campbell Hardware, Inc.*, 1979-2 Trade Cases (CCH) ¶62,794 at 78,615 (D.Mass. 1979); *In re Montgomery County Real Estate Antitrust Litigation*, 452 F.Supp. 54, 61-62 (D.Md. 1978).

The majority opinion of the court of appeals below, however, rejected these decisions and concluded that §4F(b) was not intended to permit the states to obtain access to federal grand jury materials without a showing of particularized need. The Seventh Circuit's erroneous interpretation of §4F(b) was recently followed by the Second Circuit in *In re Grand Jury Investigation of Cuisinarts, Inc.*, 1981-2 Trade Cases (CCH) ¶64,377 at 74,732 (2d Cir. 11/19/81). *Accord. Little Rock School District v. Borden, Inc.*, 1979-2 Trade Cases (CCH) ¶62,809 at 78,715 (E.D.Ark. 1979); *Matter of Grand Jury*, 469 F.Supp. 666, 671 (M.D.Pa. 1978).

The split between and among the circuit and district courts on this issue is irreconcilable. The Seventh Circuit expressly refused to follow *Colonial Chevrolet* and *B.F. Goodrich*, 659 F.2d at 802 (4a), as did the Second Circuit in *Cuisinarts*. 1981-2 Trade Cases (CCH) ¶64,377 at 74,740. The courts of appeals have interpreted §4F(b) and its legislative history in a totally divergent fashion. Because of this disarray in the law, the recurring nature of this issue and the importance of this question to effective nationwide antitrust enforcement, immediate review by this Court is essential. The conflicting deci-

sions of the courts of appeals clearly justify the grant of certiorari to review the judgment below.

## II.

## THE DECISIONS BELOW HAVE FRUSTRATED CONGRESSIONAL INTENT TO EFFECTUATE ANTITRUST ENFORCEMENT BY STATE ATTORNEYS GENERAL AND HAVE INCORRECTLY DECIDED A NATIONALLY SIGNIFICANT QUESTION OF STATUTORY CONSTRUCTION

Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub.L. 94-435, 90 Stat. 1383, to invigorate antitrust enforcement by public agencies. The decisions of the courts below, however, have effectively nullified an important component of Hart-Scott-Rodino and, therefore, undermined to a great extent the purpose which Congress meant to serve in passing the legislation.

Of particular importance to the framers of Hart-Scott-Rodino was the expansion of the role played by state attorneys general in enforcing the antitrust laws. *See* H.R. Rep. 94-499, 94th Cong., 2d Sess. 5 (1975) *reprinted in* 1976 U.S. Code Cong. & Admin. News 4054, 4057 [hereinafter "*House Report*"] (A state attorney general is "an effective and ideal spokesmen for the public in antitrust cases . . ."). To this end, Title III of the Act conferred upon the states several procedural benefits denied to other non-governmental antitrust plaintiffs. Among these innovations were: (1) granting state attorneys general the right to institute *parens patriae* suits on behalf of their citizens, 15 U.S.C. §15c; (2) exempting such suits from the class action requirements of Rule 23, Fed.R. Civ.P., 15 U.S.C. §15c(a); (3) permitting damages in *parens* suits to be computed through aggregation techniques, 15 U.S.C. §15d; and (4) directing federal antitrust enforcers to

cooperate fully with state antitrust agencies by providing them with notice of possible causes of action, 15 U.S.C. §15f(a), and the factual information necessary to evaluate the notice or institute suit under the Clayton Act. 15 U.S.C. §15f(b).[4]

Contrary to the conclusion reached below, 659 F.2d at 806-07 (13a-15a), and by the Second Circuit in *Cuisinarts*, 1981-2 Trade Cases (CCH) ¶64,377at 74,740, Hart-Scott-Rodino was not directed solely to problems of class certification and proof of damages. The Act was intended to be a comprehensive solution to perceived inadequacies in existing antitrust enforcement on the state and federal level.[5] The legislative history clearly indicates that increased cooperation and sharing of information between federal and state antitrust agencies was a fundamental objective of the legislation. *See e.g., House Report* at 17; *Hearings Before the Subcomm. on Monopolies and Comm. Law of the House Judiciary Comm. on H.R. 12528 and H.R. 12921*, 93d Cong., 2d Sess., Ser. 43 at 12-16 (1974) [hereinafter "*House Hearings*"] (Opening Statement of Chairman Rodino). As stated by Representative Rodino, increased "coordination, communication, and cooperation among Federal and State antitrust enforcers . . ." was necessary to make the other procedural innovations of the Act effective. *House Hearings* at 12.

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[4] The information-sharing provisions of §4F apply to suits brought by the state attorneys general under §4 of the Clayton Act, 15 U.S.C. §15, as well as *parens patriae* suits under §4C. *See United States v. Colonial Chevrolet Corp.*, 629 F.2d at 948 n.11; *In re Grand Jury Investigation of Armored Car Industry*, 1981-2 Trade Cases (CCH) ¶64,182 at 73,631.

[5] Title I of Hart-Scott-Rodino expanded the federal Antitrust Division's civil investigative powers. 15 U.S.C. 1311 *et seq*. Title II strengthened the Division's merger enforcement capabilities. 15 U.S.C. 18a *et seq*.

The principal vehicle for this increase in cooperation was intended by Congress to be §§4F(a) and (b). By requiring that the fruits of federal antitrust investigations be made available to the states, §4F(b) is a clear Congressional directive that tax dollars ought not and need not be used to conduct complicated antitrust investigations twice. *See House Report* at 17. In appreciation of the superior investigative resources of the federal government, and of the limited resources of the states, Congress passed §4F(b) so that the States could receive all relevant information generated by the federal government in its antitrust investigations without having to spend substantial time and money duplicating work already done.

The primary emphasis of Title III was upon the increase of civil enforcement by state attorneys general in cases which presented hardcore antitrust violations, *e.g.*, price-fixing and bid-rigging. *See* 15 U.S.C. §§15c, 15d (limiting *parens patriae* and aggregation of damages provisions to cases based upon violations of the Sherman Act). The United States Department of Justice has historically prosecuted these violations criminally. In such cases, the grand jury is the basic investigatory tool utilized by the federal government.

By construing grand jury materials to be outside the scope of §4F(b), the decisions below have destroyed the beneficial impact that this section of Hart-Scott-Rodino was meant to have. Since federal investigations of price-fixing and bid-rigging are conducted almost exclusively by the use of the grand jury, an interpretation of §4F(b) that excludes grand jury materials means that state attorneys general are denied ready access to the only materials that will effectively aid them in bringing the very class of cases contemplated by the Act.[6]

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[6] The Seventh Circuit's opinion stated that "[n]either the State [of Illinois] nor the United States has cited any evidence . . . that Congress

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Such a nugatory result could not have been what Congress intended when it passed §4F(b), a significant component of "the most far reaching expansion in the nature of antitrust enforcement since the Clayton Act of 1914." Scher, *Emerging Issues Under The Antitrust Improvements Act of 1976*, 77 Col.L.Rev. 680 (1977). As the Fourth Circuit so aptly put it: "It is unlikely in the extreme that Congress intended to exclude such materials from the statutory definition of investigative files." *United States v. Colonial Chevrolet Corp.*, 629 F.2d at 947.

Similarly, the Seventh Circuit's conclusion that the "to the extent permitted by law" language of §4F(b) indicates "that Congress did not intend to make new law concerning disclosure of grand jury materials to state attorneys general," 659 F.2d at 804 (7a), strips the statute of any utility. To require state attorneys general to demonstrate a particularized need in order to obtain grand jury materials under §4F(b) is to involve the state and the federal courts in the expensive and time-consuming type of litigation that Hart-Scott-Rodino sought to abolish.

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knew there was little investigative material extrinsic to grand jury proceedings in antitrust investigations conducted by the Department of Justice." 659 F.2d at 803 (6a). The court below indicated that it only learned of this fact at oral argument.

These statements are erroneous. A number of witnesses presented testimony to Congress regarding the Antitrust Division's use of the grand jury to investigate criminal offenses. *See e.g., House Hearings* at 23 (Statement of Asst. A.G. Kauper) ("The grand jury is an important investigatory tool, but its usefulness is limited to those situations in which we have reason to believe that a criminal violation of the antitrust laws may have occurred.") Furthermore, this issue was fully briefed in the court below. *See* State of Illinois' principal brief at 18-21; Reply brief at 6-8; United States' principal brief at 7; Reply brief at 3, filed in No. 81-1294 (7th Cir.).

The present case illustrates well the utter uselessness of §4F(b) as interpreted by the courts below. The conspiracies at issue here spanned two decades and affected hundreds of public building projects. Thousands of pages of documents and over 100 witnesses are believed to have been examined during the two year investigation. Despite the massive size of the federal government's investigation, the State of Illinois has received but 18 pages of staff memoranda which indirectly relate to the State's treble damage actions. None of the materials received pursuant to §4F(b) contain information generated during the investigation in the Northern District of Illinois. Surely this cannot be the result intended by Congress.

It must be emphasized that the purpose of §F(b) was to "increase Federal-State cooperation," *House Report* at 17, not maintain the status quo. The right of state attorneys general to obtain grand jury materials upon a showing of particularized need had already been established in pre-§4F(b) cases. *See e.g., In re Cement-Concrete Block-Chicago Area*, 381 F.Supp. 1108 (N.D.Ill. 1974); *Illinois v. Harper & Row Publishers, Inc.*, 50 F.R.D. 37 (N.D.Ill. 1969). The Seventh Circuit's conclusion that §4F(b) continues to require state attorneys general to demonstrate a particularized need necessarily means that Congress passed a statute that was redundant of existing law and totally unnecessary. Such an absurd and fruitless construction should be rejected by this Court.

As recognized by the numerous courts which have approved disclosure of grand jury materials pursuant to §4F(b), the "to the extent permitted by law" language was included in the statute to assure that §4F(b) disclosure would not undermine ongoing federal antitrust investigations or compromise the broader goals of grand jury secrecy protected by Rule 6(e), Fed.R.Crim.P. *See e.g., United States v. Colonial Chevrolet Corp.*, 629 F.2d at 950; *United States v. B.F. Goodrich Co.*, 619 F.2d at 800-801; *In re Montgomery Coun-*

*ty Real Estate Antitrust Litigation*, 452 F.Supp. at 62. Disclosure to state attorneys general pursuant to strict protective provisions will insure that the Congressional policy to promote public enforcement of the antitrust laws embodied in Hart-Scott-Rodino will be achieved in a manner consistent with the interests of grand jury secrecy.

It is well-settled that the question of disclosure is one firmly committed to the discretion of the courts, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-34 (1940); *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979), in accordance with Congressional directives that disclosure is appropriate in a given situation. The courts have traditionally balanced the competing policy justifications for continued secrecy versus the need for full disclosure of all relevant evidence. *Douglas Oil*, 441 U.S. at 219-223. Where, as here, the petitioner is the chief law enforcement officer of a state, proceeding under the aegis of §4F(b), Congress "has resolved the public interests consideration in such a case and, in so doing, it [has] accordingly relieved that official of the requirement of establishing a 'particularized need' as a threshold to disclosure." *United States v. Colonial Chevrolet Corp.*, 629 F.2d at 950. "Title III of the Hart-Scott-Rodino Antitrust Improvements Act was intended to create effective state antitrust enforcement and places the State attorneys general on a different footing than private parties seeking redress for antitrust violations." *United States v. B.F. Goodrich Co.*, 619 F.2d at 800-801. This conclusion is the only one that realizes the purpose of Congress in passing §4F(b).

This Court has never addressed itself to a request by a state attorney general for disclosure of grand jury materials, much less a request under §4F(b). Ready access to such materials is essential if state attorneys general are to play a meaningful role in enforcing the antitrust laws, our nation's "comprehensive charter of economic liberty." *Northern Pacific Railway*

*Co. v. United States*, 356 U.S. 1, 4 (1958). The Seventh Circuit's decision and other holdings like it have seriously hindered the antitrust enforcement efforts of the states. In view of the divergent judicial treatment of the issues presented herein and the nationwide impact of this question, Supreme Court review of this case is essential to effective national antitrust enforcement.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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December, 1981.

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## APPENDIX A

**Opinion of the Court of Appeals for the Seventh Circuit, September 16, 1981**

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 81-1294

IN RE: STATE OF ILLINOIS PETITION TO INSPECT AND COPY GRAND JURY MATERIALS

APPEAL OF: STATE OF ILLINOIS

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-C-0888—James B. Parsons, *Judge*.

ARGUED JUNE 10, 1981—DECIDED SEPTEMBER 16, 1981

Before SWYGERT, *Senior Circuit Judge*, CUDAHY, *Circuit Judge*, and EAST, *Senior District Judge*.*

SWYGERT, *Senior Circuit Judge*. At issue in this appeal is whether section 4F(b) of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Hart-Scott-Rodino), 15 U.S.C. § 15f(b), authorizes the disclosure of grand jury materials to a state attorney general without the traditional showing of particularized need.[1] The district court concluded that it does not,

* The Honorable William G. East, United States Senior District Judge for the District of Oregon, is sitting by designation.

[1] Section 4F of Title III, 14 U.S.C. § 15f, provides:

(a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under sections 12 to

and accordingly refused to order disclosure to the Illinois Attorney General of any materials that had been gathered or generated in connection with a grand jury criminal investigation of numerous individuals and companies, who are now defendants in a class action lawsuit brought by the State of Illinois.[2] We affirm.

I

In December 1976, the Antitrust Division of the United States Department of Justice began a grand jury investigation concerning possible violations of the federal criminal laws by persons in the construction trades in Illinois. In June 1978, a grand jury indicted eighteen corporations, thirteen persons, and a labor union for conspiring to rig bids in public sheet metal projects in metropolitan Chicago, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and the federal mail fraud statute, 18 U.S.C. § 1341. In January 1979, the grand jury indicted eighteen corporations and five persons for a bid-rigging conspiracy in piping construction projects in the Chicago area, also in violation of 15 U.S.C. § 1 and 18 U.S.C. § 1341. Forty-eight of the defendants entered pleas of *nolo contendre* and received fines and/or sentences. Four of the nine remaining defendants were convicted. All proceedings in the criminal cases have been terminated.

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[1] *continued*

27 of this title based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

(b) To assist a State attorney general in evaluating the notice, or in bringing any action under sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under sections 12 to 27 of this title.

[2] The district judge did allow disclosure of those materials "originally the property of the prosecutor or government investigator and voluntarily turned over by them to the grand jury."

Several civil class actions were filed by the State of Illinois under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. The State's civil actions tracked the criminal indictments, naming as additional defendants numerous persons and certain companies previously identified as unindicted co-conspirators in the criminal actions.

Pursuant to section 4F(b) of Hart-Scott-Rodino, 15 U.S.C. § 15f(b), the Illinois Attorney General sought all relevant materials in the possession of the United States Attorney General. The Department of Justice provided the Illinois Attorney General with documents totaling fewer than twenty pages. All remaining materials, the Department of Justice represented, were grand jury materials which could not be released absent a court order. In January 1980, the State of Illinois petitioned the district court, pursuant to section 4F(b) and Rule 6(e), Fed.R.Crim.P., for production of all grand jury materials.[3] The United States did not object to the disclosure of grand jury materials to the State of Illinois. Certain defendants in the civil suits and others intervened to oppose the State's petition.

In January 1981, the district court denied the Illinois Attorney General access to any of the requested grand

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[3] Rule 6(e), Fed.R.Crim.P., provides in pertinent part:

> Recording and Disclosure of Proceedings.
>
> . . .
>
> (3) Exceptions.
>
> . . .
>
> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; . . .
>
> . . .
>
> If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

jury materials. The district judge stated that the "investigative files and other materials" language of section 4F(b) did not refer to "material acquired by and belonging to the grand jury. . . ." He also noted that section 4F(b) states that documents are to be released only "to the extent permitted by law" and that Fed.R.Crim.P. 6(e) determines the conditions under which disclosure of grand jury materials is permissible. Because the district judge found that the petitioners had failed to meet the particularized need standard required for disclosure under Rule 6(e), access to the grand jury materials was refused.

II

The Fourth and Ninth Circuits have considered whether section 4F(b) was intended to alter the standards for disclosure of grand jury materials under Fed.R.Crim.P. 6(e) and both have concluded that it was so intended. *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, ..... U.S. ....., 101 S.Ct. 1352 (1981); *United States v. B. F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980). For the reasons that follow, we respectfully disagree.

The issue of disclosure of grand jury materials under section 4F(b) presents two questions of statutory construction: (1) whether grand jury materials are encompassed within the "investigative files or other materials" language of section 4F(b), and (2) assuming that they are, whether their disclosure is prohibited because section 4F(b) provides for disclosure only "to the extent permitted by law."

A.

The Fourth Circuit concluded that the definition of "investigative files" included grand jury materials. Noting that the grand jury investigation is often "the most important part of the 'investigative file' in an antitrust proceeding," and that the assistance Congress intended to provide "would frequently be negligible" if grand jury materials were excluded, the court held that

grand jury transcripts in the possession of the Department of Justice were "investigative files and other materials" as used in the statute. 629 F.2d at 947. The Ninth Circuit also decided that "investigative files and other materials" included grand jury materials, but it did not specify any reasons for that conclusion.

We doubt that Congress was thinking of grand jury materials when it statutorily required the United States Attorney General to make available upon request "investigative files and other materials." Beginning as we must with the statutory language itself, we note that grand jury materials are never mentioned. Moreover, the law does not permit the Department of Justice to release grand jury materials to a state attorney general "upon request" although literally that is what the petitioner's interpretation of the statute prescribes. The parties agree that a court order is required for disclosure of grand jury materials. As the Supreme Court stated in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398 (1959):

> Any disclosure of grand jury minutes is covered by Fed. Rules Crim. Proc. 6(e) promulgated by this Court in 1946 after approval of Congress. In fact, the federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it. (footnotes omitted)

Thus, while the grand jury has independence in many areas, it remains for certain purposes an appendage of the court. *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975); *United States v. Stevens*, 510 F.2d 1101 (5th Cir. 1975). Petitioner, citing *In re Grand Jury Proceedings*, 525 F.2d 151, 157 (3d Cir. 1975), asserts that the courts are without power to stay the grand jury's proceedings or to set limits on the scope of its inquiry. That proposition, whatever its worth, is irrelevant to the issue of disclosure. Had Congress intended to make a change in the law of grand jury disclosure, we would expect a provision directed to the district courts instead of to the Attorney General of the Unites States because

it is the courts that have exclusive authority under Rule 6(e) to order disclosure of grand jury materials.[4]

We are sympathetic to the State's assertion that there exists little in the way of "investigative files and other materials" to obtain if grand jury materials are not included. Neither the State nor the United States has cited any evidence, however, that Congress knew there was little investigative material extrinsic to grand jury proceedings in antitrust investigations conducted by the Department of Justice.[5] (At oral argument we learned for the first time that antitrust investigations are from the outset conducted almost entirely before the grand jury. Prior to oral argument, we had assumed that there was far more pre-grand jury investigation. We make note of this fact in no way to criticize the Justice Department's methods but simply to indicate that widespread knowledge of that practice cannot be assumed.)

The policy in favor of grand jury secrecy is "older than our Nation itself." *Pittsburgh Plate Glass*, 360 U.S.

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[4] It is not even clear that the United States Attorney General has any authority whatever over grand jury materials, although they are in his possession:

> Grand jury minutes and transcripts are not the property of the government's attorneys, agents or investigators. . . . Instead those documents are records of the court.

*United States v. Procter & Gamble Co.*, 356 U.S. 684-85 (1958) (Whittaker, J., *concurring*).

[5] Intervenors-appellees point out that one year earlier, Congress expressed a different understanding about the relationship between Government investigations and the grand jury:

> Federal crimes are "investigated" by the FBI, the IRS, or by Treasury agents and not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries.

S. Rep. No. 95-354, 95th Cong., 1st Sess. 6, *reprinted in* [1977] U.S. Code Cong. & Ad. News 527, 530.

at 399.[6] Therefore we find it difficult to believe that Congress—without a word of discussion—intended a general phrase like "investigative files and other materials" to include grand jury materials.[7]

B.

Our holding does not rest on the "investigative files and other materials" language because section 4F(b) contains a clear indication that Congress did not intend to make new law concerning disclosure of grand jury materials to state attorneys general. Section 4F(b) provides that investigative files and other materials are to be made available "to the extent permitted by law." 15 U.S.C. § 15f(b). "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intent to the contrary, that language must ordinarily be viewed as conclusive." *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

The law of grand jury disclosure is set out in Fed.R.Crim.P. 6(e) which provides *inter alia*:

* * *

(2) *General Rule of Secrecy.* [A]n attorney for the government . . . shall not disclose matters occurring

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[6] Post-judgment reasons for grand jury secrecy are:

> . . . to encourage free and untrammeled disclosure by persons who have information with respect to the commission of crimes; [and] to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

*Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 n.10 (1979) (citation omitted). Moreover, "the grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

[7] The only reference to grand jury materials in the legislative history is strong evidence that they were specifically excluded from the coverage of section 4F(b). *See infra* at 11-12.

before the grand jury, except as otherwise provided for in these rules.

* * *

(3) *Exceptions.*

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; . . . .

Rule 6(e)(3)(C)(i) does not set forth the standards for determining when release should be made. As consistently interpreted by the Supreme Court, however, Rule 6(e)(3)(C)(i) specifically prohibits the disclosure of grand jury materials except upon a showing of "particularized need." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979); *Dennis v. United States*, 384 U.S. 855, 872 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958).

The Fourth and Ninth Circuits ruled that under section 4F(b), state attorneys general are relieved of the requirement of establishing a particularized need in order to obtain disclosure. *Colonial*, 629 F.2d at 950 F.2d at 950 (4th Cir.); *B. F. Goodrich*, 619 F.2d at 801 (9th Cir.).[8] The primary basis for those decisions, and for

[8] The Fourth Circuit held that there was no absolute right to disclosure, but that "the burden of opposing disclosure in such a situation rests on those who would deny disclosure." *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943, 951 (4th Cir. 1980).

Protective orders, both the Fourth and Ninth Circuits held, were sufficient to uphold the interests of grand jury secrecy. *Colonial*, 629 F.2d at 951; *United States v. B. F. Goodrich Co.*, 619 F.2d 798, 801 (9th Cir. 1980). The State asserts that protective orders will be sufficient in our case as well. That protective orders would result in much secrecy is doubtful. As the United States itself noted, disclosure to the State of Illinois would in all likelihood lead to disclosure to the civil de-

(Footnote continued on following page)

the position urged by the State and the United States here, is that Congress explicitly recognized in Hart-Scott-Rodino "the important place State attorneys general occupy in Congress's scheme for antitrust enforcement." *B. F. Goodrich*, 619 F.2d at 801. Moreover, the State attempts to distinguish the Supreme Court cases in which the particularized need standard was articulated on the basis that there disclosure was sought by private parties rather than by a state official. *Douglas Oil*, *Dennis*, *Proctor & Gamble*. In section 4F(b), the State asserts, Congress resolved the balance between the need for disclosure and interest in grand jury secrecy in favor of disclosure without a particularized need.

We do not agree with the State's contention. Section 4F(b) requires on its face that files be made available only "to the extent permitted by law." It is clear that at the time the rule was enacted, the relevant law included both Rule 6(e) and the Supreme Court decisions requiring a particularized need. *Dennis v. United States; Pittsburgh Plate Glass Co. v. United States; United States v. Procter & Gamble Co.*[9] The State argues that Congress intended district courts faced with a section 4F(b) request to comply with the language but not the Supreme Court's interpretation of Rule 6(e)(3)(C)(i). In short, the State suggests that Congress intended disclosure to be made only when "directed by a court . . . in connection with a judicial proceeding," Rule 6(e)(3)(C)(i), but at the same time meant to dispense with the showing of "particularized need" required by the Supreme Court. *Pittsburgh Plate Glass*, 360 U.S. at 400; *Procter & Gamble*, 365 U.S. at 683. The problem with that reasoning is that, as Congress well knew, a Supreme Court decision is as much the "law" as is a

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[8] *continued*
fendants "under the liberal discovery provisions of the Federal Rules of Civil Procedure." (Brief of United States.) Similarly, as the intervenors-appellees point out, once the civil defendants have obtained disclosure, the private plaintiffs would seek the grand jury materials on the same basis.

[9] *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979), was decided after the enactment of section 4F(b).

judicial procedural rule approved by Congress and promulgated by the Supreme Court.

The State here, like the Fourth Circuit in *Colonial*, attempts to distinguish the Supreme Court's decisions by pointing out that the Court has never held that a particularized need is required when a state official is seeking disclosure of grand jury materials. Thus, it is argued, dispensing with the particularized need requirement when a state attorney general requests disclosure under section 4F(b) is not actually prohibited by existing law. That argument must fail for two reasons. First, this circuit has considered whether to release grand jury materials to a state attorney general, and we refused to permit disclosure precisely because there was a failure to show a compelling and particularized need. *In re Holovachka*, 317 F.2d 834 (7th Cir. 1963). The petitioner refers us to *In re Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894 (7th Cir. 1973), in which disclosure of grand jury materials to a Chicago police board was permitted. *Conlisk* does not support the petitioner's argument, however, because there we applied the particularized need standard. 490 F.2d at 897. The other cases cited for the proposition that existing law permits disclosure on a lesser showing are inapposite.[10]

Second, the issue in this case is not whether disclosure on less than particularized need could ever be ordered by a court consistent with existing law, but whether

[10] In *In re Grand Jury Subpoenas, April 1978*, 581 F.2d 1103 (4th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979), the grand jury materials were disclosed under one of the statutory exceptions to Rule 6(e), permitting disclosure to federal government attorneys. In *In the Matter of Disclosure of Testimony Before the Grand Jury*, 580 F.2d 281 (8th Cir. 1978), the compelling and particularized need standard was applied. The court in *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960), concluded that the inspection at issue did not constitute a disclosure of matters occurring before the grand jury. *Doe v. Rosenberry*, 255 F.2d 118 (2d Cir. 1958), only addressed the issue of whether the release of grand jury materials was "preliminary to . . . a judicial proceeding" as required by Rule 6(e), Fed.R.Crim.P., and did not discuss any judicially-prescribed standard for disclosure.

section 4F(b) is "a Congressional directive to the courts that grand jury materials should be disclosed to state attorneys general, without a showing of particularized need. . . ." (Reply brief of the State.) The phrase "to the extent permitted by law" certainly does not indicate that Congress intended to make important new law in the area of disclosure of grand jury material; instead it connotes the existing law.[11] We are certain that if Congress intended to create the change that the petitioner suggests, it would have said so. It is simply impossible to believe that the "'indispensable secrecy of grand jury proceedings,'" *Procter & Gamble*, 356 U.S. at 682 (citation omitted), would have been altered by Congress *sub silentio*.

Any lingering doubt as to whether disclosure of grand jury materials was contemplated by Congress is dispelled by the only reference to grand jury materials in the legislative history of section 4F(b). To Senator Roman Hruska's objection to section 4F(b) on the basis that it could turn the Department of Justice into a "massive document distribution center," 122 Cong. Rec. 29144 (1976), Senator James Abourezk, Senator Floor Manager for the bill, replied:

> The section specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. *Under existing law, he cannot turn over materials given in response to a grand jury demand* or to a civil investigative demand.

122 Cong. Rec. 29160 (1976) (emphasis added).[12] A statement by one of the sponsors of the legislation

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[11] It is undisputed that no other provision of Hart-Scott-Rodino refers to the right of state attorneys general to obtain Justice Department files or other materials.

[12] We find the Fourth Circuit's construction of Senator Abourezk's remarks to be strained at best. *See Colonial*, 629 F.2d at 947. Nothing in the statute indicates that the Senator was referring to the necessity for a court order pursuant to Rule 6(e) but not to the standards under which disclosure would be ordered.

"deserves to be accorded substantial weight in interpreting the statute." *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *accord, National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967); *see also Browder v. Tipton*, 630 F.2d 1149, 1151-52 (6th Cir. 1980) (holding that a statement by the Manager of a bill is entitled to "great weight").

The only other relevant legislative history is a House Report on an earlier version of section 4F(b) which explained that Justice Department files were to be made available "to the State attorneys general 'to the extent permitted by law.' This means that the files are to be made available except where specifically prohibited." H.R. No. 94-499, 94th Cong., 2d Sess. 17 (1975), *reprinted in* [1976] U.S. Code Cong. & Ad. News, at 2586-87. That statement is completely consistent with Senator Abourezk's remarks, because existing law does prohibit the release of grand jury materials unless there is a showing of particularized need.[13]

Finally, it is argued that the purpose of Hart-Scott-Rodino mandates a conclusion that Congress "relieved [a state attorney general] of the requirement of establishing a 'particularized need' as a threshold condition to disclosure." *Colonial*, 629 F.2d at 950 (4th Cir. 1980). The Ninth Circuit noted that "Title III of the Hart-Scott-Rodino Antitrust Improvements Act was intended to create effective state antitrust enforcement and places the State attorneys general on a different footing than

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[13] A leading commentary on the legislative history of section 4F(b) has concluded that under that provision, the United States Attorney General is required

> to provide [state attorneys general] with investigative files and other materials, except for materials obtained through grand jury proceedings . . . , which may not be provided.

Kintner, Griffin & Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 Geo. Wash. L. Rev. 1, 30 (1977).

The commentators also note that the position asserted by the Department of Justice is "in conflict with the legislative history." *Id.*

private parties seeking redress for antitrust violations." *B. F. Goodrich*, 619 F.2d at 800-01. The State contends that the "different footing" afforded state attorneys general demonstrates that Congress intended to waive the particularized need requirement for disclosure of grand jury material. We cannot agree that because Congress intended to enhance the role of state attorneys general in antitrust law enforcement, section 4F(b) must be interpreted to alter the standard for disclosure of grand jury materials. In *In re Grand Jury Investigation of Cuisinarts, Inc.*, No. H-81-224 (D. Conn. June 8, 1981), the district judge explained in detail why although a state attorney general is placed on a new footing vis-a-vis *parens patriae* actions, the conclusion reached by the Fourth and Ninth Circuits is incorrect. Because we agree with his analysis, we quote from that opinion at some length here:

> Having reviewed the legislative history of Hart-Scott-Rodino, the court concludes that, as a general matter, the statute sweeps less broadly, and thus elevates the state role in antitrust enforcement to a lesser extent, than the petitioners assert. By authorizing states to bring civil antitrust actions, as *parens patriae*, Hart-Scott-Rodino does create a place for state governments in the enforcement of federal antitrust laws. Those *parens patriae* actions were intended, however, to fill only a narrow gap in the prior scheme of enforcement. The draftsmen of Hart-Scott-Rodino noted two technical problems which limited the usefulness, and thus deterred the filing, of private consumer class actions. The first problem was the difficulty, under Rule 23, Fed.R. Civ.P., of gaining class certification, *see* [H.R. Rep. No. 499, 94th Cong., 2d Sess. 6-8, *reprinted in*] [1976] U.S. Code Cong. & Ad. News 2576-2577; the second was the difficulty of "managing" such an action, once a class has been certified, *id.* at 2583-2584. [footnote omitted.] Hart-Scott-Rodino attempts to solve both problems.
>
> The concept of a *parens patriae* suit had long been known at common law. In the United States, it had

evolved into a means by which a state could "sue in its quasi-sovereign capacity on behalf of its citizens to prevent interference with the flow of goods or natural resources" into the state or "to prevent acts of pollution." Kintner, Griffin & Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis* ("Hart-Scott-Rodino: An Analysis"), 46 Geo. Wash. L. Rev. 1, 18-19 (1977). Although the *parens patriae* action was recognized to be the most efficient means of overcoming the obstacles to private class actions, judicial decisions in the early 1970's had limited the ability of states to bring such suits to remedy antitrust violations. *Hart-Scott-Rodino: An Analysis* 19; *see Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973). Reacting to these decisions, *see* [H.R. Rep. No. 499, 94th Cong., 2d Sess. 7-9, *reprinted in*] [1976] U.S. Code Cong. & Ad. News 2577-2578, Congress, in Hart-Scott-Rodino, authorized the states to proceed as *parens patriae* in antitrust cases. [The House Report noted that the provision permitting *parens patriae* actions by state attorneys general was "the heart" of the bill. H.R. Rep. No. 499, 94th Cong., 2d Sess. 9 [1975], *reprinted in* [1976] U.S. Code Cong. & Ad. News at 2578.] Congress solved the problem created by Rule 23, Fed.R.Civ.P., simply by making clear that class certification would not be required in *parens patriae* actions, *see* 15 U.S.C. § 15c(a). It solved the chief problem in managing such actions by permitting damages to be computed through aggregation techniques, *see* 15 U.S.C. § 15d.

Discovery problems were not of apparent concern to the draftsmen of the *parens patriae* provisions. With respect to discovery issues, the draftsmen noted only that the individual consumer lacked the investigative resources to disclose a possible conspiracy in violation of the antitrust laws. *See* [H.R. Rep. No. 499, 94th Cong., 2d Sess. 6-7, *reprinted in*] [1976] U.S. Code Cong. & Ad. News 2575-2576. The draftsmen clearly recognized that either a class action or a *parens patriae* action could solve this

problem by putting the resources of the class or the state government to work in discovery. Thus the only apparent concern of the draftsmen with respect to discovery was that of overcoming the individual litigant's lack of financial resources. Significantly, the reports of the relevant Congressional committees never mention as a problem in antitrust enforcement any substantive limitations on discovery imposed by the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure.

Thus Hart-Scott-Rodino is but "a *limited* legislative response to [a] perceived loophole in antitrust liability." *Hart-Scott-Rodino: An Analysis* 19-20 (emphasis supplied). It provides specific, carefully tailored solutions to technical problems of antitrust enforcement. There is no indication that its draftsmen ever regarded the existing rules of procedure concerning discovery as a problem in such enforcement, or that they intended to modify, no less contravene, the existing rules.

*In re Grand Jury Investigation of Cuisinarts, Inc.*, No. H-81-224 (D. Conn. June 8, 1981).

The State contends that if Congress did not intend to relieve state attorneys general of the particularized need requirement, section 4F(b) does no more than codify what was already often the informal practice of the United States Attorney General to make his files available to state attorneys general. Even if section 4F(b) does not increase the amount of material exchanged, a requirement that the Department of Justice make available all relevant or potentially relevant material within its legal authority to disclose is not insignificant. That the provision would be more powerful were grand jury materials included and the particularized need requirement waived is beside the point. There is nothing in the language of the statute or its legislative history to lead us to the conclusion the State advocates. Instead of purporting to make new law concerning grand jury disclosure, the statute states that the investigative files and other materials shall be made

available only *"to the extent permitted by law."* (emphasis added) The legislative history contains a strong indication that section 4F(b) was not to alter existing law concerning disclosure of grand jury materials. We therefore conclude that section 4F(b) does not relieve the Illinois Attorney General of the obligation to show particularized need in order to obtain disclosure here.

The judgment of the district court is affirmed.

EAST, *Senior District Judge*, dissenting: I respectfully dissent. The major purpose or goal of § 4F(b) is to put the several states more readily into the antitrust business by lending them the federal investigative work product regarding antitrust violations.[1] It is arguable whether congressional intent to open the grand jury's investigative record to a requesting and proper state is

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[1] Notwithstanding remarks made during the Senate debate, the House Committee Report states that the Act provides

> 'a new federal antitrust remedy which will permit the State attorneys general to recover monetary damages on behalf of State residents injured by violations of the antitrust laws. The [Hart-Scott-Rodino Act] is intended to compensate the victims of antitrust offenses, to prevent antitrust violators from being unjustly enriched, and to deter future antitrust violations.' H.R.Rep.No.94-499, 94th Cong. 1st Sess. 3, reprinted in [1976] U.S. Code Cong. and Admin. News, p. 2572.
>
> • • •
>
> These statements and the Act itself indicate that Congress intended to make grand jury materials available to State attorneys general except where specifically prohibited and without a showing of particularized and compelling need. . . . [The] Act was intended to create effective state antitrust enforcement and places the State attorneys general on a different footing than private parties seeking redress for antitrust violations.

*United States v. B. F. Goodrich Co.*, 619 F.2d 798, 800-01 (9th Cir. 1980).

directly stated in the legislation. Nevertheless such congressional intent is readily implied.[2]

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[2] Section 4F(b) was included in the final enactment of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 at the insistance of the House conferees. *See* 122 Cong. Rec. at 29, September 7, 1976. The House expressed its intent in a report on an earlier, substantially similar version of the Act:

> Section 4F promotes *parens patriae* actions as a major aspect of antitrust enforcement by encouraging Federal-State cooperation. The section provides that whenever the United States has brought suit in its proprietary capacity under § 4A of the Clayton Act, and the U.S. Attorney General believes that the same antitrust violation may have given rise to potential *parens patriae* claims, he shall notify the appropriate State attorneys general. Whenever a State attorney general so requests, in order to evaluate the notice from the U.S. Attorney General or in order to bring a *parens patriae* action, section 4F(b) requires the U.S. Attorney General to make the Justice Department's investigative files available to the State attorneys general 'to the extent permitted by law.' *This means that the files are to be made available except where specifically prohibited.*
>
> *Section 4F(b) reflects the committee's desire that the Federal Government cooperate fully with State antitrust enforcers.*
>
> The benefits of increases in Federal-State cooperation and coordination of antitrust enforcement are obvious, and are achieved in H.R.8532 without the expenditure of additional Federal funds.

H.R.No.94-499, 94th Cong., 2d Sess. 17 (1975), reprinted in 1976 U.S. Code Cong. & Admin. News, at pp. 2586-87. (Emphasis added.)

> The need for access to grand jury materials is greater for states than for ordinary individuals because of the important place State attorneys general occupy in Congress's scheme for antitrust enforcement. This need is met by section 4F(b) which, in our view, impliedly directs the Attorney General of the United States to disclose grand jury materials to State attorneys general without the showing of particularized and compelling need which is normally required by Rule 6(e).

*B. F. Goodrich Co.*, 619 F.2d at 801.

The secrecy of the grand jury proceedings so reverently kept may be adequately preserved by an appropriate protective order of the District Court granting the release of any of the grand jury's record.

I am persuaded by the interpretation of the legislation in *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 1352 (1981), and *United States v. B. F. Goodrich Co.*, 619 F.2d 798 (9th Cir 1980), notwithstanding the majority's view to the contrary. In order to resolve the conflict between the circuits which has now arisen, I would urge Congress to enact appropriate legislation clearly setting forth its intention in the premises.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

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## APPENDIX B

**Opinion by Judge Swygert**
**Judge William East, Dissenting**

**JUDGMENT — ORAL ARGUMENT**

**UNITED STATES COURT OF APPEALS**

For the Seventh Circuit
Chicago, Illinois 60604
September 16, 1981

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM G. EAST, Senior District Judge*

IN RE:
STATE OF ILLINOIS
PETITION TO INSPECT
AND COPY GRAND JURY
MATERIALS

APPEAL OF:
STATE OF ILLINOIS

No. 81-1294

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 0888
Judge James B. Parsons

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

* The Honorable William G. East, United States Senior District Judge for the District of Oregon, is sitting by designation.

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* The Honorable William G. East, United States Senior District Judge for the District of Oregon, is sitting by desig ation.

## APPENDIX C

## Order of the Court of Appeals for the Seventh Circuit, September 30, 1981

**UNITED STATES COURT OF APPEALS**

For the Seventh Circuit
Chicago, Illinois 60604

September 30, 1981

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM G. EAST, Senior District Judge*

No. 81-1294

IN RE: STATE OF ILLINOIS PETITION TO INSPECT AND COPY GRAND JURY MATERIALS

APPEAL OF: STATE OF ILLINOIS

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 0888
James B. Parsons, Judge.

ORDER

The following paragraph shall be inserted as footnote 4 at the end of the first full paragraph on page 4 of the opinion.

> "4 This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the question of our declining to follow the Fourth and Ninth Circuits."

The remaining footnotes shall be renumbered accordingly.

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* Sitting by designation.

## APPENDIX D

**Order of the Court of Appeals for the Seventh Circuit, November 5, 1981**

**UNITED STATES COURT OF APPEALS**

For the Seventh Circuit
Chicago, Illinois 60604

November 5, 1981

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

No. 81-1294

IN RE:
STATE OF ILLINOIS
PETITION TO INSPECT
AND COPY GRAND JURY
MATERIALS.

APPEAL OF:
STATE OF ILLINOIS.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 0888
Judge James B. Parsons

On consideration of the "MOTION TO STAY MANDATE" filed herein on October 15, 1981, by counsel for the State of Illinois,

IT IS ORDERED that said motion is hereby GRANTED and the mandate of this court is hereby STAYED to and including December 21, 1981, pursuant to Federal Rule of Appellate Procedure 41(b).

## APPENDIX E

## Order of the Court of Appeals for the Seventh Circuit, March 20, 1981

**UNITED STATES COURT OF APPEALS**

For the Seventh Circuit
Chicago, Illinois 60604
March 20, 1981

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

IN RE: STATE OF ILLINOIS PETITION TO INSPECT AND COPY GRAND JURY MATERIALS

No. 81-1294

APPEAL OF:
STATE OF ILLINOIS

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80-C-0888,
Hon. James B. Parsons,
Judge.

ORDER

Pursuant to Rule 33 of the Federal Rules of Appellate Procedure, counsel for petitioner-appellant, State of Illinois, and counsel for certain other parties, respondents-appellees, had a conference with Mr. John L. Gubbins, Senior Staff Attorney for the Court. In the conference the following procedural schedule was adopted:

(1) This appeal shall be expedited to oral argument.

(2) Counsel for appellees are encouraged to cooperate to avoid unnecessary duplication by filing a joint brief or by adopting factual statements or arguments of co-party.

(3) Unless already accomplished, all counsel engaged in this appeal shall immediately file their appearances using the forms provided by the Clerk of this Court.

(4) The record of appeal including transcript, if any, shall be filed with the Clerk on or before March 23, 1981.

(5) The petitioner-appellant shall file its brief and appendix on or before April 15, 1981.

(6) Certain parties shall file their brief and appendix on or before May 18, 1981.

(7) The remaining appellees shall file their reply brief, if any, on or before May 27, 1981.

(8) The petitioner-appellant shall file its reply brief, if any, on or before June 2, 1981.

(9) This appeal will be set for oral argument on June 8, 1981.

(10) All counsel who have not done so shall file their appearances and certificates of interest. Those counsel who do not wish to disclose the identity of their clients shall submit their appearances and certificates of interest identifying their client. Undisclosed parties shall then be assigned an identifying letter by the court and their attorney will be notified of the letter assigned which will then be used in all further filings and correspondence. All appearances and certificates of interest shall be retained by the court under seal.

(11) All appearances and certificates of interest shall be filed with the court within twelve (12) days of the date of this order.

(12) No certificates of interest need be filed with any briefs filed by any party.

(13) Any appellee who appears but fails to file a brief shall be deemed to have taken a position adverse to the appellant or to any other party filing a brief in support of the appellant's position.

(14) All briefs shall be served by the court upon opposing parties once the proper number of such briefs are filed with the Clerk.

(15) All parties shall be informed by the court of the number of briefs needed for service one week prior to the date their brief is due to be filed.

## APPENDIX F

**Opinion of the District Court for the Northern District of Illinois, January 8, 1981**

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

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|---|---|
| In Re State of Illinois Petition to Inspect and Copy Grand Jury Material<br>and<br>Board of Education of Township High School District 205, Cook County, Illinois, et al.,<br>Petitioners,<br>v. | No. 80 C 0888 |
| JOSEPH WIDMAR, Director of Operations, and JOHN BURLEY, acting Chief, Midwest Office, Antitrust Division U.S. Department of Justice,<br>Respondents. | No. 79 C 3046<br>79 C 3077 |

MEMORANDUM OPINION AND ORDER

The Attorney General of the State of Illinois and other local public officials along with a host of private parties have peti-

tioned this Court for an order allowing them to inspect and copy all materials of this Court's August 1977 grand jury, including transcripts of the testimony of grand jury witnesses, and documents and exhibits gathered by the grand jury in the furtherance of its special investigation. The investigations culminated last year in several criminal indictments.[1] The private party petitioners are some of the alleged victims of the crimes.

All the petitioners before me already have filed civil suits against the defendants and co-conspirators named in the criminal cases premised upon the same conspiracies that were alleged in the antitrust criminal actions. The juxtaposition of Section 4F(b) of the Clayton Act and Rule 6(e) F.R.Cr.P., according to the petitioners, requires disclosure of all of the grand jury's materials to the State Attorney General upon a showing of relevance to the Clayton Act. They contend that Rule 6(e) permits disclosure to all of the petitioners.

Two issues thus are presented. The first is whether Section 4F(b) of the Clayton Act authorizes disclosure of federal grand jury materials which may be in the possession of federal attorneys to State Attorney Generals. Section 4F(b) of the Clayton Act states:

> To assist a State attorney general in evaluating the notice or in bringing any action under Sections 12 to 27 of this title, the Attorney General of the United States shall,

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[1] On June 12, 1978 and January 31, 1979, a federal grand jury empanelled in Chicago returned indictments against sheetmetal and piping construction companies and certain of their corporate officers alleging violation of Section 1 of the Sherman Antitrust Act. *U.S. v. S. J. Reynolds, et al.*, 79 CR 66; *U.S. v. Borg, et al.*, 79 CR 67; *U.S. v. Climatemp, et al.*, 78 CR 388. All litigation has now been terminated.

> upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under section 12 to 17 of this title. 15 U.S.C. §15 F(b) (1976).

At the outset I am convinced that Section 4F(b) does not apply to all grand jury materials which may be found in the hands of the government attorney. The literal language within Section 4F(b) recites nothing concerning grand jury materials as such. The language specifically speaks of "investigative files or other materials" and then qualifies delivery of those materials by use of the clause "to the extent permitted by law." Rule 6(e) itself provides a limited disclosure by government attorneys of what it calls "matters occuring before the grand jury." Disclosure within that limitation need not, by the rule, require permission or an order by the court. The government attorney merely reports the disclosure to the court. All other disclosures require court order and, within the literal language of the rule, are to be authorized only under certain specific circumstances. A simple recitation of the rule is important here. Rule 6(e) in pertinent part reads as follows:

> Rule 6. *The Grand Jury*
>
> (e) Recording and Disclosure of Proceedings.
>
> (1) Recording of Proceedings. — The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.
>
> (2) General Rule of Secrecy. — A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an

attorney for the government, or any person to whom disclosure is made under paragraph (3) (A) (ii) of this subdivision shall not disclose matters occurring before the grand jury except as otherwise provided for in these rules. *** A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to ***

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. ***

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made –

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made

> in such manner, at such time, and under such conditions as the court may direct.

Nothing quoted above may be interpreted as permitting the government attorney to make disclosures of "matters occurring before the grand jury" or grand jury materials, which, along with his investigative files, may by happen-chance be "the materials" in his possession. It would thus seem that 4F(b) reaches the attorney's investigative files even though he may not have presented them to the grand jury. Further, it appears that the phrase "other materials" does not relate to matters presented to the grand jury and in particular does not relate to matters acquired by grand jury process only.

When "in other matters" Congress has intended to include transcripts of grand jury testimony and matters acquired by grand jury process among materials that are to be produced by the prosecutor under specific circumstances, it has stated so expressly.[2] There is no literal reading of 4F(b) nor traditional concept of statutory construction which supports the petitioners' contention on this point. Unless it can be found from the legislative history of the Act that Congress intended this section to embrace grand jury materials, this section cannot be construed, in my opinion, to apply to grand jury materials acquired by the grand jury other than by virtue of the investigative work of the attorney and made available to the grand jury as a result of his own voluntary action.

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[2] 18 U.S.C. §3500(e)(3) 1970 provides in part:

Demands for production of statements and reports of witnesses.

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means . . .

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

My position that Section 4F(b) does not apply to materials acquired by and belonging to the grand jury itself is confirmed in the legislative history of the section. The House Report states:

> Whenever a State attorney general so requests, in order to evaluate the notice from the United States Attorney General or in order to bring a parens patriae action, Section 4F(b) requires the United States Attorney General to make the Justice Department's investigative files available to the State attorney general "to the extent permitted by law." This means that the files are to be made available except where specifically prohibited. U.S. Cong. & Ad. News 2572, 2586 (1976).

The House Report invokes the question of whether grand jury materials constitute a part of the "Justice Department's investigative files". Case reference to it impliedly invites this conclusion by citing Mr. Justice Whittaker's concurring opinion in *United States v. Procter & Gamble Co.*, 356 U.S. 684-85 (1958), in which he clearly stated that "[g]rand jury minutes and transcripts *are not the property of the government's attorneys*, agents or investigators .... *Instead those documents are records of the court*." (Emphasis added).

While grand jury materials are traditionally property of the Judicial Branch of government, I conclude that Section 4F(b) applies only and exclusively to the *investigative files* and *other materials acquired by and belonging to the Executive Branch, of which the Department of Justice is a member.* Congress has been careful not to offend the fundamental concept of separation of powers. Courts should be exceptionally careful not to offend that concept in a zealous effort to assist the Executive Branch in the performance of its characteristically executive responsibilities.

Section 4F(b) states that the Justice Department's files are to be made available only to the extent specifically permitted by law. Rule 6(e) of the Federal Rules of Criminal Procedure has a force and effect of law.[3] It determines when there may be disclosure of grand jury materials.[4] During the final Senate debate on the 1976 Amendment to Rule 6(e), Senator Abourezk[5] stated that Section 4F(b):

> [s]pecifically limits the Attorney General's power to release documents to whatever his powers are under existing law. Under existing law, he cannot turn over the materials given in response to a grand jury demand as to a civil investigation demand. Therefore the section is limited by existing law to cases where materials were turned over voluntarily. 122 Cong. Rec. §15,333 (Daily Ed. Sept 7, 1976).

It is unequivocal that Congress intended Section 4F(b) not to include grand jury materials except those which were originally the property of the prosecutor or government investigator and voluntarily turned over by them to the grand jury. This Court has consistently declined to prevent the prosecutor from turning over to third parties materials which he himself acquired and then made available to the grand jury. It's conceivable that a different position would be taken had

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[3] 18 U.S.C. 3771; 38 F.R.D. 14, 20 (1964)

[4] Rule 6(e)(c)(i) as stated above is for disclosure by the Court. The disclosure is "preliminary to or in connection with a judicial proceeding." But the Supreme Court has established guidelines for this disclosure which have not been met by the petitioners here. And, of course, it tells the trial judge to make disclosures to the defendant in the criminal case brought by the grand jury; but then, the petitioners here are not the defendants in the cases brought by the grand jury. Those defendants are the respondents and opponents to this petition.

[5] D. South Dakota. The Senator was a proponent of the Amendment.

he refused to produce them before the grand jury without a subpoena.

It is the grand jury's process that makes the difference. The court's subpoena is perhaps the most powerful investigative tool in the American criminal justice system. Citizens have been jailed for wilfully failing to obey it. Its strength can be diluted by decisions that loosely toss around the products of its process.

In an attempt to persuade this Court that Section 4F(b) itself authorizes the disclosure of strictly grand jury materials, petitioners cite a recent Ninth Circuit Court of Appeals decision. *United States and State of California v. B.F. Goodrich*, No. 79-4009 (9th Cir. May 22, 1980).[6] In *Goodrich*, the Circuit Court affirmed a district court's order allowing discovery of all grand jury materials by the California Attorney General under Section 4F(b) of the Clayton Act. The Ninth Circuit concluded that the attorneys' "investigative files or other materials" included the grand jury materials in question. It seems to me that in this reading of Section 4F(b), the real legislative intent behind the Section has been extended by the

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[6] In September 1976, a special grand jury was empanelled in the Northern District of California to investigate possible violations of the antitrust laws in Goodrich's sale of tires in six western states. The special grand jury called witnesses and subpoenaed documents. In February 1978, the special grand jury completed its term. It did not return an indictment against Goodrich.

In August 1978, the U.S. filed a civil antitrust action against Goodrich.

On September 22, 1978, California filed an antitrust action against Goodrich in the district court. On the same day, California filed a motion to inspect and copy all grand jury materials gathered during the investigation. California sought the materials in bringing its action under sections 4 and 4c of the Clayton Act.

inference that whatever occurs before the grand jury is impressed with a proprietary interest belonging to the prosecutor. It seems further to imply that a 6(e) order would be unnecessary since disclosure under the circumstances by the government's attorneys is mandated by 4F(b); yet it grants the order under 6(e).

The Ninth Circuit stated:

> The need for access to grand jury materials is greater for states than for ordinary individuals because of the important place State attorneys general occupy in Congress' scheme for antitrust enforcement. This need is met by Section 4F(b) which, in our view, impliedly directs the Attorney General of the United States to disclose grand jury materials to State attorneys general . . . *Id* at 4.

I have no doubt that the purpose of Section 4F(b) is to assist State Attorney Generals in pursuing antitrust violators. However, read in the light of its legislative history I do not believe Section 4F(b), even impliedly, directs the U.S. Attorney General to take possession of and make unmonitored disclosures of purely grand jury materials to State Attorney Generals at their request. And if 4F(b) so dictates, it follows logically that the States' Attorney General as a petitioner here doesn't need a 6(e) order from this Court unless the Attorney General of the United States is unwilling voluntarily to make delivery.

In addition, a factual distinction can be found between *Goodrich* and the instant case. In *Goodrich*, no indictments were returned and no criminal trial ensued. As a result California had not had the opportunity, as the present petitioners have had, to ascertain the names of the witnesses and to examine the documents that were produced in a public trial. California's ability to conduct proper civil discovery was

burdened because it had no access to trial transcripts. A Rule 6(e) motion might have seemed appropriate under those circumstances in order for California to make an easy showing of a particularized need.

This distinction raises the second issue. The issue is whether the requested grand jury material might win disclosure on a motion made under Rule 6(e) without reference to 4F(b). Of course the petitioners contend that Section 4F(b) when read in conjunction with Rule 6(e) dispenses with the "particularized need" showing that is necessary under the Supreme Court's interpretation of 6(e). See: *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211 (1979).

In *Douglas Oil*, the Supreme Court, after reaffirming its position taken 20 years earlier in *Proctor & Gamble*, set out what may be referred to as a three-prong test, each element of which would need to be satisfied before grand jury materials might be disclosed. The Court stated:

> Parties seeking grand jury transcripts under Rule 6(e) must show the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only materials so needed. *Dougles Oil v. Petrol Stops Northwest*, *supra* at 222.

The moving party must satisfy these requisite elements of the test even when the grand jury whose materials are sought, has concluded its operations. *Id.* at 222.

The petitioners have failed, in my view, to satisfy any of the necessary elements of *Douglas Oil*. It seems inescapable that without meeting the same or some similar type of test,

disclosure of grand jury materials pursuant to Rule 6(e) is highly inappropriate. I believe that even where a 4F(b) situation is presented, the protective test of *Douglas* must be given great deference. Specifically, the petitioners here have neglected to show this Court that the grand jury material they seek is needed to avoid a possible injustice in their other judicial proceedings. *Id*. The gist of the showing needed is the avoidance of a possible injustice.

The Seventh Circuit in *Illinois v. Sarbough*, 552 F.2d 768, 776-777, (7th Cir. 1977), *cert denied*, 434 U.S. 889 (1977), suggested as an example that a "possible injustice" would occur when there has been an unfair access by one side to information unavailable to the other. Relying upon this explanation, the petitioners argue that the respondents have had unfair access to the materials they seek. They say that without disclosure an "injustice in another judicial proceeding will occur"; they allege this, they don't show it. This fact was clearly demonstrated in *Dennis v. United States*, 384 U.S. 855, 872-874 (1964). In reviewing the instant record, one finds that there is no evidence of there having been "unfair access" made available to any party. It is neither unfair nor inequitable to require petitioners to proceed with available civil discovery procedures and by that method seek to obtain the same or substantially similar information. The petitioners have not demonstrated that by use of civil discovery procedures they will be unable to obtain the information they will need to prosecute their claims. The truth of the matter is that they have made no significant attempt whatsoever to obtain information through any other procedures available to them. The names of all the trial witnesses are available for use in setting up depositions, and voluminous trial documents are available to be examined.

Consider another requisite element outlined by *Douglas Oil*: without showing a recognizable particular need, it is impossible to determine whether the need for disclosing the grand jury material is greater than the need for continued secrecy. *Id.* As noted above, the Supreme Court has consistently stated that the requisite need to be shown by a party seeking grand jury materials must be a "particularized need". The petitioners must, therefore, demonstrate that theirs is a "particularized need". A particularized need is to be distinguished from a general need in that the particularity of the need is shown with exact detail. It is an especial need and not just any ordinary one. It speaks in terms of specifics. It explains to the court the uniqueness of petitioners' positions. Petitioners, for example, need to demonstrate the reasons for disclosure which are peculiar and particular to them in the sense in which they differ one from the other. They should describe how they differ from petitioners in the usual case of civil discovery.

A particularized need can arise, for example, when a litigant seeks to use "the grand jury transcripts at the trial to impeach a witness, to refresh his recollection or to test his credibility." *Procter & Gamble, Co.* at 682. The petitioners here have not shown for example that documents which could be available to them through proper civil discovery would be inadequate for such purposes as refreshing recollection or impeachment. Until this type of burden has been met, what is left is a rule 6(e) motion linked with Section 4F(b) that for all intents and purposes says to the court, "Hand us our case ready made for us by the grand jury."

Finally, according to *Douglas*, petitioners should demonstrate that "their request is structured to cover only [the] materials [they will actually need]." Petitioners have simply requested the release to them of all of the grand jury

material. In their quest for information grand juries often acquire reams of documents and hours of testimony later to be found irrelevant to the investigation or the final charge. Its wholesale disclosure could be embarrassing, if not destructive of third parties or of unindicted individuals and corporations concerned when witnesses are called upon to testify or furnish evidence which involves them. This is one of the principal reasons why grand jurors are sworn to secrecy. It is the duty of the court in following 6(e) to protect from public scrutiny and injury such individuals and corporations. Petitioners after having done little more than filing a suit, seek an all-encompassing, unparticularized general type of full disclosure which by the very nature of the request would defeat the spirit and rule of *Procter & Gamble* and *Douglas Oil*. Their request offends the common-law concern for the traditional protection of the innocent that has been built into our grand jury system from its earliest conception.

I conclude, as a matter of law, that Section 4F(b) of the Clayton Act does not refer to what is strictly thought of as grand jury materials. Therefore, petitioners' motion must be denied. This denial, however, is without prejudice. Petitioners may wish to direct their 4F(b) requests to the government's attorneys and acquire voluntarily from them those materials which are theirs, or came into their possession as the product of their own research and their own investigation. With this accomplished they may be able to proceed quite definitively into the pre-discovery conferences that would be convened by the judges to whom their several cases have been assigned. (See Rule 26(f), F.R.C.P.) As a result of these procedures, doubtless they would be able at least to narrow their requests before me to what under 6(e)(3)(C)(i) might properly and effectively be pursued.

It is reasonable to anticipate that within a relatively short period of time following the filing of this memorandum, the

petitioners herein will renew their petitions stating and demonstrating that they shall have then exhausted all of the feasible procedure for civil discovery and setting out in detail their remaining particularized needs. If the motion at that time would be allowable my procedure would be to forward the grand jury documents and records to the judge to whom, in each instance, the civil case is assigned. This comports with the procedure followed in *Douglas Oil, supra*.

In the interest of saving time and effort, I am herewith entering my order pursuant to the authority given me by 28 U.S.C. 137, delegating henceforth to the respective judge in each of the civil cases involved in this matter my responsibility and authority under Rule 1.03(B) of the General Rules of this Court and Rule 1.04 of the Criminal Rules of this Court, as it relates to these petitions.

ENTER:

/s/ JAMES B. PARSONS
United States District Judge

Dated: January 8, 1981

## APPENDIX G

**Order of the District Court for the Northern District of Illinois, February 21, 1980**

**UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

Name of Presiding Judge, Honorable JAMES B. PARSONS

Cause No. 80C0888 Date February 21, 1980

(SUPPRESSED)

(79 C 4898, 79 C 5253, 78 CR 388, 79 CR 66 & 79 CR 67)

**Title of Cause:**

In re: State of Illinois petition to inspect and copy Grand Jury material.

On the Court's own motion, State of Illinois' petition to inspect and copy grand jury material with supporting memorandum shall be given civil suppressed docket number 80C0888. Letters dated January 31, 1980 and February 14, 1980 addressed to Chief Judge to stand in the record as part of the States petition filed January 31, 1980.

It is further ordered that the title of this matter (and all future pleadings filed) henceforth shall be, In re: State of Illinois' petition to inspect and copy grand jury material. Counsel shall file their appearances in this matter and all process and notice hereinafter issue under said title and case number, but that all matters filed herein be filed with the minute clerk for the Chief Judge in room #2538A. Motion of certain defendants to establish a special docket and setting of a briefing schedule received February 14, 1980 shall be considered filed of said date. Said motion and all subsequent motions for briefing schedules etc. to be set must follow motion heard in open court with notice by movant to all parties.

# Joint Appendix

FILED
JUN 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1114

# In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ILLINOIS,
*Petitioner,*
vs.
ABBOTT & ASSOCIATES, INC.,
et al.,
*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## JOINT APPENDIX

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Attorney General
State of Illinois

THOMAS M. GENOVESE
Assistant Attorney General
Chief, Antitrust Division
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(312) 222-9350
*Counsel for Respondents:*

Abbott & Associates, Inc.
Eugene Abbott
Anderson & Litwack Company
James Anderson
Mid-City National Bank as Executor
for the Estate of Harvey Anderson

(Other respondents and counsel listed inside front cover)

**PETITION FOR CERTIORARI FILED DECEMBER 15, 1981**
**CERTIORARI GRANTED MARCH 22, 1982.**

Printed by the Authority of the State of Illinois — 5-19-82

Reliable Sheet Metal Works, Inc.
Melvin Fakter
W. Wanzenberg & Company
Henry C. Wanzenberg

**ACTING ON BEHALF OF RESPONDENTS**

Pullman Sheet Metal Works, Inc.
Lester Goldwin
F.E. Moran, Inc.
Owen Moran
Byness, Inc.
James Connor
Dennis Dams
The Narowetz Company
Robert Moon
Gideon Engineering Corp.
Admiral Heating & Ventilating, Inc.
Ronald Litt
Moto Heating-Ventilating-Air Conditioning Corp.
Borg, Inc.
Ideal Heating Company
C.W. Johnson, Inc.
Windsor Heating Company
Bellis-Hanley, Inc.
Beverly Heating Company
Grigus, Inc.
Hans Jensen & Sons, Inc.
Illinois Heating & Ventilating Company
Kelleher, Inc.
Mehring & Hanson-Wendt, Inc.
National Heat & Power Company, Inc.
Northwestern Industrial Piping, Inc.
Piping Systems, Inc.
Voris, Inc.
Economy Mechanical Industries, Inc.
S.J. Reynolds Company, Inc.
Phillips, Getschow Company
Howard Salzman
Edward W. Usher
Charles W. Blodgett
Everett H. Janke
Clemens E. Sharp
Robert F. Lawinger, Jr.
Walter S. Hojka, Jr.
Edward Grigus
Robert H. Jensen
Gerald A. Kelly
Thomas E. Kelleher
Robert I. Nash
Harold Hurvitz
Joseph S. Kearney, Sr.
Joseph S. Kearney, Jr.
Robert E. Curran
William J. Voris
Elmer R. Bruksch
Lee E. Getschow
Stanley B. Bellis
Sheet Metal Workers, International Association, Local 73
Evco Associates, Inc.
Robert Irsay Co.
Wagner Heating & Ventilating Co.
Zack Company
R.A. Martin Co., Inc.
Mellish & Murray Co.
AC Company
Steel City Ventilating & Sheet Metal Co.
Crone Associates
Hunter Clark Ventilating Co.
Donald Lewis
John Eiselt
Robert Freiny
Charles L. Howard
Gideon Goldschmidt
Richard S. Wise
Robert Ahrenhold
Kenneth Gardner
H. James Murray
John J. Coogan
William Black
Raymond J. Lyons
Gene Bednarz
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Attorney For Respondents
Climatemp, Inc.; Victor Comforte

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## EXPLANATORY NOTE

Both the docket in the lower court and the record on appeal have been suppressed by court order. Therefore, there has been only limited access to the record of the proceedings below in the preparation of this joint appendix. Petitioner and Respondents believe that the items noted in this appendix are matters of record in this case.

No. 81-1114

# In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ILLINOIS,
*Petitioner,*

vs.

ABBOTT & ASSOCIATES, INC.,
et al.,
*Respondents.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The following Opinions and Orders have been omitted in printing this appendix because they appear on the following pages of the appendix to the printed Petition for Writ of Certiorari:


Opinion of the District Court for the Northern District of Illinois, January 8, 1981 ..... 26a

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## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

| DATE | FILINGS — PROCEEDINGS |
|---|---|
| 6/12/78 | Indictment returned in *United States v. Climatemp, Inc., et al.*, 78 CR 388 (N.D.Ill.). |
| 10/17/78 | Illinois Attorney General's request to U.S. Department of Justice pursuant to 15 U.S.C. Sec. 15F(b). (Sheetmetal Litigation). |
| 1/31/79 | Indictments returned in *United States v. S.J. Reynolds Co., Inc., et al.*, 79 CR 66 (N.D.Ill.) and *United States v. Borg, Inc., et al.*, 79 CR 67 (N.D.Ill.). |
| 11/2/79 | Illinois Attorney General's request to U.S. Department of Justice pursuant to 15 U.S.C. Sec. 15F(b). (Piping Litigation). |
| 11/21/79 | Complaint filed in *State of Illinois v. Climatemp, Inc., et al.*, 79 C 4898 (N.D.Ill.) |
| 12/14/79 | Complaint filed in *State of Illinois v. Borg, Inc., et al.*, 79 C 5253 (N.D.Ill.) |
| 1/31/80 | Illinois Attorney General's Petition To Inspect And Copy Grand Jury Materials And Presentencing Memoranda. |
| 1/31/80 | Memorandum In Support Of Petition To Inspect And Copy Grand Jury Materials And Presentencing Memoranda. |
| 2/21/80 | Order of the District Court re suppression of docket. |
| 5/6/80 | Objection and Memorandum of Inland Heating & Air Conditioning Company and Lawrence Krueger to Petitions For Disclosure Of Grand Jury Material. |

| | |
|---|---|
| 5/19/80 | Supplemental Memorandum In Support Of Petition To Inspect And Copy Grand Jury Materials And Presentencing Memoranda. |
| 5/19/80 | Memorandum of the United States In Response to Petitions by the State of Illinois and Certain Treble-Damage Plaintiffs for Disclosure of Grand Jury Material. |
| 6/16/80 | Joint Brief In Opposition To Disclosure Of Grand Jury And Presentencing Materials. |
| 6/25-27/80 | Various Memoranda or Supplemental Briefs and Materials on Behalf of Certain Respondents In Opposition to Disclosure of Grand Jury Materials. |
| 7/16/80 | Reply Memorandum of the United States In Response to Petitions by the State of Illinois, the County of Cook and Certain Treble-Damage Plaintiffs for Disclosure of Grand Jury Materials. |
| 7/17/80 | Memorandum Of The State Of Illinois In Reply To Briefs Opposing Disclosure Of Grand Jury And Presentencing Materials. |
| 8/12/80 | Surreply In Opposition To Disclosure Of Grand Jury And Presentencing Materials. |
| 1/8/81 | Opinion of the District Court for the Northern District of Illinois. |
| 2/6/81 | Notice of Appeal filed. |
| 3/20/81 | Order of the Court of Appeals for the Seventh Circuit re suppression of docket. |
| 9/16/81 | Opinion of the Court of Appeals for the Seventh Circuit. |
| 9/16/81 | Judgment of the Court of Appeals for the Seventh Circuit. |
| 11/5/81 | Order granting motion to stay mandate. |

**UNITED STATES DEPARTMENT OF JUSTICE**
**Washington, D.C. 20530**

June 26, 1978

WES:FEH
60-206-61
60-12-150

Honorable William J. Scott
Attorney General of Illinois
500 South Second
Springfield, Illinois 62706

Dear Mr. Attorney General:

As you may be aware, on June 12, 1978, a federal grand jury sitting in Chicago, Illinois, returned a 13 count felony indictment charging 18 Illinois corporations and 12 of their officers with bid rigging and mail fraud in connection with sheet metal work on public construction projects in the Chicago area. A Chicago construction union and its president were also indicted on the bid rigging charge.

Also, on June 16, 1978, a federal grand jury sitting in Danville, Illinois, returned a 13 count felony indictment charging four corporations and two of their officers with bid rigging and mail fraud in connection with three bids let by the State of Illinois. Copies of both indictments are enclosed.

I bring these matters to your attention since the public projects subject to the bid rigging conspiracies included projects let by the State of Illinois.

Sincerely yours,

/s/ WILLIAM E. SWOPE
William E. Swope
Director of Operations
Antitrust Division

Enclosures
[Enclosures not printed]

**WILLIAM J. SCOTT**
**Attorney General**
**State of Illinois**

Chicago Office
160 N. LaSalle Street
60601
Telephone: 793-3500

October 17, 1978

Mr. William E. Swope
Director of Operations
Antitrust Division
Department of Justice
Washington, D.C. 20530

RE: *United States v. Climatemp, Inc., et al.,*
Criminal Action No. 78-CR-388

Dear Mr. Swope:

Thank you for apprising this office of the 13 count felony indictment which was recently returned by a federal grand jury sitting in Chicago, Illinois, entitled *United States v. Climatemp, Inc., et al.*, No. 78-CR-388.

In response thereto, I have commenced an investigation of those public projects which were let by the State of Illinois and were subject to bid-rigging conspiracies. In furtherance of this investigation, I am hereby requesting whatever information you can supply concerning the *Climatemp* indictment which may be relevant to an actual or potential cause of action which would be brought by the State of Illinois. I am making this request under the auspices of Section 4F(b) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. Sec. 15f.

Your attention to this matter is sincerely appreciated. If you have any questions concerning this request, please do not hesitate to contact me.

Sincerely,

/s/ LEE H. WEINER
Lee H. Weiner
Assistant Attorney General
Antitrust Division
188 W. Randolph — Suite 2118
Chicago, IL. 60601
Phone: (312) 793-2582

LHW:bo

**WILLIAM J. SCOTT**
**Attorney General**
**State of Illinois**

Chicago Office
160 N. LaSalle Street
60601
Telephone: 793-3500

November 2, 1979

Mr. Joseph Widmar
Director of Operations
Antitrust Division
Department of Justice
Washington, D.C. 20530

RE: *United States v. Borg, Inc., et al.*, No. 79 CR 67 (N.D.Ill.) and *United States v. S.J. Reynolds Co., Inc., et al.*, No. 79 CR 66 (N.D.Ill.); Clayton 4F(b) Request

Dear Mr. Widmar:

Our office is preparing to institute a civil action against Chicago-area piping contractors who were defendants in the above-mentioned cases. On January 31, 1979 a Federal Grand Jury returned an indictment for a violation of Section 1 of the Sherman Act. All defendants subsequently pleaded nolo contendere except one corporation, and that corporation was recently found guilty in a jury trial.

Pursuant to Section 4F(b) of the Clayton Act, we hereby request access to all investigative and Grand Jury materials relating to these actions. Please advise at your earliest convenience.

Sincerely,

/s/ BRUCE J. BAKER
Bruce J. Baker
Assistant Attorney General
Antitrust Division
188 W. Randolph — Suite 2118
Chicago, IL. 60601
Phone: (312) 793-2582

BJB:bjb
cc: John Sarbaugh
Department of Justice, Chicago

**UNITED STATES DEPARTMENT OF JUSTICE**
**Washington, D.C. 20530**

January 3, 1979

WES:DCK
60-12-150

Lee H. Weiner, Esquire
Assistant Attorney General
Antitrust Division
Office of the Attorney General
State of Illinois
188 W. Randolph — Suite 2118
Chicago, Illinois 60601

Dear Mr. Weiner:

This is in response to your letter of October 17, 1978, requesting investigative materials pursuant to Section 4F of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. Sec. 15F), relating to *U.S. v. Climatemp, et al.*, Criminal No. 78-CR-388.

I am enclosing copies of the grand jury and preliminary inquiry requests from the staff in this investigation. These materials are being made available to you under the provisions of 15 U.S.C. Sec. 15F and they should not be disclosed to any other third party without our prior consent.

As was stated in your telephone conversation of December 26 with this office, we are unable to supply you with other materials at this time, since those materials are subject to the requirements of grand jury secrecy set forth in Rule 6(e) of the Federal Rules of Criminal Procedure and, consequently, may not be disclosed to you absent a court order. Should you wish to seek such an order for access to grand jury documents and

materials containing grand jury information following the trial of this case, we are prepared to support an application to the court.

I hope that the materials we are able to provide will be of assistance to you in your investigation.

Sincerely yours,

/s/ DONALD C. KLAWITER
Donald C. Klawiter
Special Assistant,
Office of Operations
Antitrust Division

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff,* V. CLIMATEMP, INC., ET AL., *Defendants.* | 78 CR 388 |
| UNITED STATES OF AMERICA *Plaintiff,* V. S.J. REYNOLDS, INC., ET AL., *Defendants.* | 79 CR 66 |
| UNITED STATES OF AMERICA, *Plaintiff,* V. BORG, INC., ET AL., *Defendants.* | 79 CR 67 |
| THE STATE OF ILLINOIS, ET AL., *Plaintiffs,* V. CLIMATEMP, INC., ET AL., *Defendants.* | 79 C 4898 |
| THE STATE OF ILLINOIS, ET AL., *Plaintiffs,* V. BORG, INC., ET AL., *Defendants.* | 79 C 5253 |

## PETITION TO INSPECT AND COPY GRAND JURY MATERIALS AND PRESENTENCING MEMORANDA

The STATE OF ILLINOIS, through its Attorney General, WILLIAM J. SCOTT, hereby respectfully petitions this Court pursuant to Section 4F(b) of the Clayton Act (15 U.S.C. Section 15(f)(b)) and Rule 6(e), Federal Rules of Criminal Procedure, for an order allowing it to inspect and copy all grand jury materials, including transcripts of grand jury witnesses, presentencing memoranda which were filed in the above-referenced criminal actions, and documents and exhibits gathered or generated pursuant to the federal grand jury's investigations which resulted in the return of the indictments, 78 CR 388, 79 CR 66, and 79 CR 67.

As grounds for this Petition, the Plaintiff states:

1. On June 12, 1978 and January 31, 1979, a federal grand jury empanelled in Chicago returned indictments against sheet metal and piping construction companies and certain corporate officers thereof charging them with violations of Section 1 of the Sherman Act;

2. That subsequent thereto, forty-nine of said defendants entered pleas of *nolo contendere*, one was found guilty by jury verdict, and all fifty have now received fines or sentences;

3. That the Government's piping litigation (*United States v. S.J. Reynolds, et al.*, 79 CR 66, hereinafter "*Reynolds*"), and (*United States v. Borg, et al.*, 79 CR 67, hereinafter "*Borg*"), has now terminated and the remaining eight defendants in the Government's sheet metal litigation (*United States v. Climatemp, et al.*, 78 CR 388, hereinafter "*Climatemp*") are now scheduled for trial on February 4, 1980;

4. That on November 21, 1979 and December 14, 1979, the State of Illinois filed class action lawsuits against the same

criminal defendants and unindicted co-conspirators based on the identical conspiracies as alleged in the Government's criminal actions;

5. That on October 17, 1978 and November 2, 1979, the Antitrust Division of the Illinois Attorney General's Office requested from the United States Department of Justice, under the auspices of Section 4F(b) of the Antitrust Improvements Act of 1976, 15 U.S.C. Section 15(f), all relevant information concerning the *Climatemp* and *Reynolds-Borg* indictments;

6. That the State of Illinois, Plaintiff herein, in order to assist it in proceeding with its actions under Sections 4 and 16 of the Clayton Act, is now requesting all grand jury transcripts, documents, exhibits, and presentencing memoranda which may otherwise be protected under Rule 6(e) Fed.R.Crim.P.;

7. That in many instances, Plaintiff believes that the materials so requested have already been disclosed to some or all of the defendants herein;

8. That the materials requested are extremely relevant and material to Plaintiff's causes; their disclosure will insure and promote efficient and economical utilization of scarce judicial and taxpayers resources, and will also obviate the need for duplicative and redundant discovery, benefitting all parties thereby.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General
State of Illinois

/s/ LEE H. WEINER
Lee H. Weiner
Assistant Attorney General
Antitrust Division
188 W. Randolph — Suite 2118
Chicago, IL 60601
(312) 793-2582

**OFFICE OF THE CLERK**
**SUPREME COURT OF THE UNITED STATES**
**WASHINGTON, D.C. 20543**

March 8, 1982

Arthur C. Chapman, Esq.
Suite 1800
Three First National Plaza
Chicago, Illinois 60602

RE: Illinois v. Abbott & Associates, Inc., et al. No. 81-1114
A-746

Dear Mr. Chapman:

The Court today entered the following order in the above-entitled case:

> "The application of "undisclosed respondents" for an order to keep identities of certain respondents held *in camera* presented to Justice Stevens and by him referred to the Court is granted."

Very truly yours,
/s/ ALEXANDER STEVAS
Alexander L. Stevas, *Clerk*

rwk
cc: counsel of record

**OFFICE OF THE CLERK**
**SUPREME COURT OF THE UNITED STATES**
**WASHINGTON, D.C., 20543**

March 22, 1982

Thomas M. Genovese, Esq.
Assistant Attorney General
Antitrust Division
188 W. Randolph, Suite 2118
Chicago, Illinois 60601

RE: Illinois v. Abbott & Associates, Inc., et al., No. 81-1114

Dear Mr. Genovese:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

* * *

Very truly yours,
ALEXANDER L. STEVAS, *Clerk*
/s/ By JUNE M. HOFFMAN
(Miss) June M. Hoffman
Assistant Clerk

Enclosures
cc: All counsel of record
with enclosures

[Enclosures not printed]

# Brief for the United States

Office - Supreme Court, U.S.
FILED
JAN 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1114

# In the Supreme Court of the United States

OCTOBER TERM, 1981

---

STATE OF ILLINOIS, PETITIONER

*v.*

ABBOTT & ASSOCIATES, INC., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES AS RESPONDENT

---

REX E. LEE
*Solicitor General*

WILLIAM F. BAXTER
*Assistant Attorney General*

ROBERT B. NICHOLSON
MARK C. DEL BIANCO
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

1. Whether grand jury transcripts and subpoenaed exhibits in the files of prosecutors who conducted a grand jury investigation are "investigative files or other materials" within the meaning of Section 4F(b) of the Clayton Act, 15 U.S.C. 15f(b).

2. Whether Section 4F(b) authorizes disclosure to state attorneys general of grand jury materials relating to antitrust investigations on less of a showing than particularized and compelling need.

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# In the Supreme Court of the United States

OCTOBER TERM, 1981

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No. 81-1114

STATE OF ILLINOIS, PETITIONER

*v.*

ABBOTT & ASSOCIATES, INC., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS RESPONDENT

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 659 F. 2d 800. The opinion of the district court (Pet. App. 26a-39a) is not yet officially reported.

### JURISDICTION

The judgment of the court of appeals was entered on September 16, 1981 (Pet. App. 19a). A petition for a writ of certiorari was filed on December 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTE AND RULE INVOLVED

Section 4F(b) of the Clayton Act, 15 U.S.C. 15f(b), as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1395-1396, provides:

> To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the action or potential cause of action under this Act.

Federal Rule of Criminal Procedure 6(e)(3)(C) provides in part:

> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made:
>
> * * * * *
>
> (i) when so directed by a court preliminarly to or in connection with a judicial proceeding * * *.

**STATEMENT**

In December 1976, the Antitrust Division of the United States Department of Justice began a grand jury investigation in the Southern District of Illinois of possible violations of federal criminal laws by persons in the construction trades in the state. As part of that investigation, the grand jury subpoenaed documents and called certain persons to testify. In August 1977, the investigation was transferred to and continued in the Northern District of Illinois.

On June 12, 1978, the grand jury indicted eighteen corporations, thirteen individuals, and a labor union for conspiring to rig bids on public sheet metal projects in metropolitan Chicago, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and the mail fraud statute, 18 U.S.C. 1341. *United States* v. *Climatemp, Inc., et al.*, No. 78 CR 388 (N.D. Ill.). On January 31, 1979, the grand jury indicted eighteen corporations and five individuals for a bid rigging conspiracy involving piping construction projects in the Chicago area,

also in violation of Section 1 of the Sherman Act and the mail fraud statute. *United States* v. *Borg, Inc., et al.*, No. 79 CR 67 (N.D. Ill.). All but nine of the defendants pled nolo contendere and were sentenced. Of those defendants who stood trial, four were convicted (Pet. 5-6; Pet. App. 2a).

In November and December 1979, the Illinois Attorney General filed two antitrust actions parens patriae against the defendants in the criminal cases. At the conclusion of the criminal cases, he petitioned the district court, pursuant to Section 4F(b) of the Clayton Act, 15 U.S.C. 15f(b), and Rule 6(e), Fed. R. Crim. P., for production of grand jury transcripts and documents developed during the grand jury investigation. These materials were then in the custody of the Antitrust Division. The United States did not object to the disclosure request.

The district court denied Illinois' petition on the ground that grand jury records are not "investigative files or other materials" within the meaning of Section 4F(b) (Pet. App. 30a-31a).[1] The court held that Section 4F(b) applies only to those grand jury materials that originally belonged to the government and were voluntarily submitted by the government to the grand jury, and not to other grand jury materials (*id.* at 31a). The court also denied disclosure under Rule 6(e), on the ground that the requisite "particularized need" had not been shown (*id.* at 35a-38a).

The State of Illinois appealed, and the court of appeals affirmed, with one judge dissenting (Pet. App. 1a-18a). The court of appeals doubted that Congress intended to include grand jury materials among the "investigative files or other materials" that the Attorney General was required by

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[1]Several private plaintiffs who had filed related civil antitrust suits asked for similar material. Their motions were denied, and they did not appeal.

Section 4F(b) to turn over to the states (*id.* at 4a-7a). It further held that Congress, in enacting Section 4F(b), had not intended to relieve state attorneys general of the need to make a showing of particularized and compelling need in order to gain disclosure of grand jury materials (*id.* at 7a-16a).[2] In this respect, the court acknowledged (*id.* at 4a) that its ruling was contrary to those of the Fourth and Ninth Circuits in *United States* v. *Colonial Chevrolet Corp.*, 629 F. 2d 943 (4th Cir. 1980), cert. denied *sub nom. Certain Unindicted Individuals and Corporations* v. *United States*, 450 U.S. 913 (1981); and *United States* v. *B.F. Goodrich Co.*, 619 F. 2d 798 (9th Cir. 1980).

Senior District Judge East, relying on the recent Fourth and Ninth Circuit decisions, dissented (Pet. App. 16a-18a).

## ARGUMENT

The court of appeals' decision directly conflicts on an important question of federal law with recent decisions by two other courts of appeals. Review by this Court is therefore warranted.

1. The effect of Section 4F(b) on a state attorney general's request for disclosure of grand jury materials is an important and disputed issue. It involves the interpretation of a major federal statute and affects the facility with which states can enforce the federal antitrust laws. The issue, moreover, has arisen with increasing frequency over the last three years and now has given rise to a conflict in the circuits. The Fourth and Ninth Circuits have held that once criminal proceedings are over, Section 4F(b) authorizes a district court to disclose grand jury materials to a state attorney general on a showing less stringent than that of

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[2]The state did not contend that it had shown particularized and compelling need for the grand jury materials.

compelling and particularized need.[3] The Seventh Circuit, recently joined by the Second Circuit,[4] has held that Section 4F(b) does not affect the standards governing disclosure of grand jury materials.[5] This conflict is especially undesirable because it haphazardly gives some states greater litigation rights than other states in an area of federal law where Congress has been demonstrably solicitous of maintaining uniformity. Cf. 15 U.S.C. (& Supp. IV) 15, discussed at S. Rep. No. 619, 84th Cong., 1st Sess. 5 (1955) (uniform federal statute of limitations in antitrust cases).

2. The court of appeals' decision, furthermore, thwarts Congress' purpose to facilitate state enforcement of the federal antitrust laws. Section 4F is an essential element of a broad congressional scheme endowing state attorneys general with special authority to enforce the antitrust laws. Companion provisions to that section empower state attorneys general to bring parens patriae antitrust actions on behalf of consumers (15 U.S.C. 15c), relax evidentiary standards for proving damages in such cases (15 U.S.C. 15d), and sanction either the allocation of aggregate damages to compensate injured consumers or the payment of such damages into the state treasury as a civil penalty (15 U.S.C. 15e). Section 4F itself acknowledges the congressionally favored status of state attorneys general in initiating parens patriae and other types of antitrust suits by directing the United States Attorney General to offer them

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[3] *United States* v. *Colonial Chevrolet Corp.*, 629 F. 2d 943 (4th Cir. 1980), cert. denied *sub nom. Certain Unindicted Individuals and Corporations* v. *United States*, 450 U.S. 913 (1981); *United States* v. *B.F. Goodrich Co.*, 619 F. 2d 798 (9th Cir. 1980).

[4] *In re Grand Jury Investigation of Cuisinarts, Inc.*, No. 81-7338 (2d Cir. Nov. 19, 1981).

[5] The issue is presently before the Fifth Circuit. *In re Grand Jury Proceedings, Misc. No. 1331*, No. 81-1059 (5th Cir., argued Dec. 9, 1981).

investigative assistance. Section 4F(a) (15 U.S.C. 15f(a)) requires prompt notice to the states of federal antitrust actions where there is reason to think that a state may be entitled to bring a similar action, and Section 4F(b) provides that, once notified, a state attorney general is to have specified access to the Attorney General's files.

The plain language and the legislative history of Section 4F demonstrate Congress' intent to facilitate state enforcement of the antitrust laws. See H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 3 (1975); S. Rep. No. 94-803, 94th Cong., 2d Sess. 5-7 (1976). Section 4F was designed to make state suits "a major aspect of antitrust enforcement." H.R. Rep. No. 94-499, *supra*, at 17. This congressional intent, however, is severely impaired if grand jury materials can be disclosed to state attorneys general only on the same showing required of private parties.

Congress expected, and experience has confirmed, that most state antitrust suits would challenge conduct that is per se illegal under the antitrust laws. And, the Antitrust Division investigates per se violations almost exclusively by grand jury. Thus, in the ordinary criminal antitrust case, there is little material in the Division's files that is not grand jury material. The present case is typical. Though the files contain thousands of pages of material, only eighteen pages have so far been disclosed to the state. The vast majority of useful material cannot now be turned over to Illinois because it is contained in grand jury transcripts or documents.

As the Seventh Circuit itself seemed to recognize (Pet. App. 15a-16a), Section 4F(b) is seriously compromised under its reading. This result is contrary to settled principles of statutory construction and is particularly inappropriate here, since there is good reason to believe that Congress

knew of the Antitrust Division's heavy reliance on grand jury investigations when it enacted Section 4F(b).[6] The court of appeals nonetheless felt compelled to deny the state access to grand jury materials because of its "doubt" that the term "investigative files or other materials" includes grand jury materials and its ruling that the equalifying phrase "to the extent permitted by law" forecloses any standard other than that of compelling and particularized need (Pet. App. 4a-16a). The court was wrong in both respects.

It is axiomatic that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The broad phrase "investigative files or other materials" readily encompasses grand jury materials in the investigative files of the Antitrust Division. Grand jury materials are "files" because they are part of and are contained in files. They are "investigative files" because they are developed and collected by government prosecutors when they conduct antitrust investigations before a grand jury. Moreover, even if these documents were not "investigative files," they would surely be "other materials." Faced with materials that fit within the plain meaning of the statute, the court of appeals was obliged to show a clear legislative intent to the contrary. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc., supra*, 447 U.S. at 108. The court, however, was unable to cite anything in the legislative history to support its contrary reading.

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[6]See *Antitrust Civil Process Act Amendment: Hearings on H.R. 39 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 34 (1975) (statement of Assistant Attorney General for Antitrust); cf. Steinhouse, *Antitrust Grand Jury Procedure*, 23 Clev. St. L. Rev. 447 (1974).

The court also misread the qualifying phrase "to the extent permitted by law" as endorsing the compelling and particularized need standard (Pet. App. 9a-11a). The definitive House report explains that this phrase means that the files "are to be made available except where specifically prohibited." H.R. Rep. No. 94-499, *supra*, at 17. As the court recognized, once a district court authorizes disclosure under Rule 6(e), the Attorney General is "permitted by law" to turn over grand jury materials to a state attorney general (Pet. App. 9a-10a). The critical question is thus the effect of Section 4F(b) on the Rule 6(e) standard applicable to a state request. The court of appeals thought that the compelling and particularized need standard necessarily applied. But that standard was developed by this Court exclusively in the context of private party requests for grand jury materials. See, *e.g.*, *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 213 (1979). This Court has never decided a case involving a state request for grand jury materials, let alone a state request buttressed by Section 4F(b).

Both the structure and purpose of the statute require that state attorneys general be able to obtain grand jury materials on a less burdensome showing than that applicable to private antitrust plaintiffs. This does not mean that states may obtain these materials on demand. As both the Fourth and Ninth Circuits emphasized, there will be no disclosure until criminal proceedings are concluded. Even then, the district court should hedge disclosure with appropriate protective orders, and a district court may refuse disclosure to a state attorney general if in a particular case the opponent of disclosure demonstrates a sufficient likelihood and gravity of harm to the interests furthered by continued secrecy. *B.F. Goodrich Co.*, *supra*, 619 F. 2d at 800, 801, *Colonial Chevrolet Corp.*, *supra*, 629 F. 2d at 950-951. But, as the Fourth

and Ninth Circuits have done, this Court should strike an appropriate balance between federal antitrust enforcement policy and the concern for secret operation of grand juries.

## CONCLUSION

For the foregoing reasons, the petition of the State of Illinois for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1982

DOJ-1982-01

# Opposition

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Office - Supreme Court, U.S.
FILED
FEB 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1114

# In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ILLINOIS,

*Petitioner,*

v.

ABBOTT & ASSOCIATES, INC., ET AL.,

*Respondents.*

On Petition for a Writ of Certiorari to The United States Court of Appeals For the Seventh Circuit

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the "investigative files and other materials" whose disclosure is authorized by Section 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b), include federal grand jury materials or only those government records that are the property of the executive branch.

2. Whether the requirement of Rule 6(e) of the Federal Rules of Criminal Procedure, that federal courts may order disclosure of grand jury materials only when the party seeking disclosure has demonstrated particularized and compelling need, is inapplicable when grand jury materials are requested by a state attorney general under Section 4F(b).

3. Whether Section 4F(b) requires the automatic and wholesale turn-over of federal grand jury materials upon request by a state attorney general.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 659 F.2d 800. The opinion of the district court (Pet. App. 26a-39a) is unofficially reported in [1980-81] TRADE CASES (CCH) ¶ 63,771 at 78,103.

## JURISDICTION

The judgment of the court of appeals was entered on September 16, 1981. On September 30, 1981, the panel opinion was modified to reflect that it had been circulated among all circuit judges in regular active service, none of whom favored rehearing *en banc*. The petition for a writ of certiorari was filed on December 15, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

## STATUTE AND RULE INVOLVED

Section 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b), as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1395-1396, provides:

> To assist a State attorney general in evaluating the notice or in bringing any action under sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under sections 12 to 27 of this title.

Rule 6e of the Federal Rules of Criminal Procedure, provides in pertinent part:

> (2) [A]n attorney for the government . . . shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.
>
> (3)(c) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; . . .

## STATEMENT OF THE CASE

In June 1978, a federal grand jury in the Northern District of Illinois indicted 18 corporations, 13 individuals, and a labor union for alleged violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, in connection with the submission of bids on public sheet metal construction projects in the Chicago area (Pet. App. 2a). In January 1979, the same grand jury indicted 18 corporations and five individuals for similar alleged violations in connection with piping construction projects (*ibid.*). Nine defendants were eventually tried on these indictments; four defendants were convicted and five were acquitted. The remaining defendants entered pleas of *nolo contendere* (*ibid.*). While certain of the criminal cases were still on-going, civil antitrust class actions were initiated by numerous persons, including petitioner (*id.* at 26a-27a). Named as defendants in these class actions were the defendants in the criminal cases, other companies and individuals identified in the bills of particulars, and other companies and individuals neither indicted nor identified in the criminal cases (*id.* at 3a).

In January 1980, before taking any discovery in the civil actions, numerous plaintiffs, including petitioner, petitioned the United States District Court for the Northern District of Illinois for leave to inspect and copy all documents relating to the criminal cases, including all presentencing reports, all documents and exhibits gathered by the grand jury, and all transcripts of testimony given before the grand jury (Pet. App. 26a-27a). Each of the petitions rested upon Fed.R.Crim.P. 6(e); the State's petition also rested upon Section 4F(b) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15f(b). *See, e.g.*, Pet.App. 27a. The petitions were consolidated before the chief judge and respondents were permitted to intervene (*id.* at 3a).

On January 8, 1981, after the issues had been fully briefed, the district court entered an order granting the State's petition in part, denying it in part without prejudice, and denying the remaining petitions without prejudice (Pet. App. 26a-39a). In its memorandum opinion, the court first considered whether the State was entitled to grand jury materials under § 4F(b). Based on the language and legislative history of § 4F(b), the court concluded that "this section cannot be construed . . . to apply to materials acquired by the grand jury *other than* by virtue of the investigative work of the attorney and made available to the grand jury as a result of his own voluntary action" (Pet. App. 30a; emphasis added).[1] The court also concluded that there was no evidence to show that Congress intended, when it enacted § 4F(b), to abrogate the long-standing requirement that any disclosure of grand jury materials under Rule 6(e) be supported by a showing of particularized and compelling need (Pet. App. 33a-35a).

With respect to the Rule 6(e) requests, the court concluded that neither petitioner nor the other parties seeking disclosure had then demonstrated particularized and compelling need, and the court therefore denied the Rule 6(e) petitions without prejudice to their later renewal

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[1] The court reasoned that materials acquired by the grand jury process did not become "investigatory files and other materials" of the executive branch merely because they "may by happen-chance be" in the possession of government attorneys (Pet. App. 30a). Likewise, materials originally acquired by the executive branch are not subject to grand jury secrecy requirements merely because they have been shared with the grand jury. Thus, the court permitted disclosure of those grand jury materials that were "originally the property of the prosecutor or government investigator and voluntarily turned over by them to the Grand Jury" (*id.* at 32a).

(Pet. App. 35a-38a).[2] Indeed, the district court anticipated that the parties seeking disclosure (including petitioner) would commence discovery in the civil cases and then reframe their Rule 6(e) petitions in narrower terms, at which time the court would forward the grand jury materials to the district judges to whom the civil cases had been assigned (Pet. App. 38a-39a, *citing Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979)). Instead, petitioner immediately appealed,[3] and the court of appeals affirmed by divided vote.

Recognizing that "[t]he policy of grand jury secrecy is 'older than our Nation itself'" (Pet. App. 6a, *quoting Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (1959)), the court of appeals concluded that grand jury secrecy should be deemed abrogated only upon a clear showing that Congress so intended (Pet. App. 11a, 15a-16a). The court also noted that Congress, in drafting §4F(b), did not specifically define "investigative files and other materials" to include grand jury materials, and the legislative history contains no hint that Congress "intended a general phrase like 'investigative files and other materials' to include grand jury materials" (Pet. App.

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[2] Contrary to the Solicitor General's assertion (G. Br. at 4, n.2), the State in fact argued that it had shown particularized need. *See, e.g., Supplemental Memorandum of the State of Illinois In Support of Petition to Inspect and Copy Grand Jury Materials and Presentencing Memoranda*, at 7-17 (filed May 19, 1980). However, the district court found the State's arguments devoid of factual support, observing that "Petitioners, after having done little more than filing suit, seek an all-encompassing, unparticularized general type of full disclosure which by the very nature of the request would defeat the spirit and rule of *Proctor & Gamble* and *Douglas Oil*" (Pet. App. 38a).

[3] The other parties seeking disclosure did not appeal and are not therefore petitioners in this Court.

7a). Indeed, Congress specifically restricted disclosures under §4F(b) to those "permitted by law," thus indicating both its understanding that preexisting legal principles limited disclosure and its intention to incorporate those principles (Pet. App. 9a-11a).

When Congress enacted § 4F(b), it was beyond dispute that grand jury materials could not be disclosed absent a showing of particularized and compelling need. Thus, although no mention is made of Rule 6(e) in the legislative history, the court found that omission reflected an intention to preserve, rather than abrogate, existing law. As the court said, "It is simply impossible to believe that the 'indispensable secrecy of grand jury proceedings' . . . would have been altered by Congress *sub silentio*" (Pet. App. 11a; *quoting Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 399).[4] The court of appeals therefore declined (Pet. App. 4a) to follow *United States* v. *Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied,* 450 U.S. 913 (1981), and *United States* v. *B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980).

Judge East of the District of Oregon, sitting by designation, dissented (Pet. App. 16a-18a). He would have followed the law of his circuit, but he also urged that Congress "enact appropriate legislation clearly setting forth its intention in the premises" (*id.* at 18a). The panel opinion was circulated to all circuit judges in regular active service, and no judge favored rehearing *en banc* (Pet. App. 21a).

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[4] Moreover, the court of appeals found (Pet. App. 11a-15a) that the legislative history of § 4F(b), while somewhat sparse, affirmatively indicates that Congress intended to incorporate existing legal standards governing disclosure of grand jury materials.

## REASONS FOR DENYING THE WRIT

### I.

### THE DECISION BELOW IS CLEARLY CORRECT.

The court of appeals correctly held that § 4F(b) does not abrogate the particularized need requirements of Rule 6(e) when state attorneys general seek disclosure of grand jury materials. This narrow holding, which was recently followed by the Second Circuit in *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24 (1981), is compelled not only by the language and legislative history of both § 4F(b) and Rule 6(e), but also by numerous decisions of this Court concerning disclosure of grand jury materials.

At the threshold, the court of appeals correctly observed that Congress never referred to grand jury materials in connection with the enactment of § 4F(b), and it is inconceivable that Congress intended, merely by including the general phrase "investigative files and other materials," to nullify both the terms of Rule 6(e) and the well-established principle of grand jury secrecy that is currently embodied in this rule (Pet. App. 6a-7a). At all events, grand jury materials are no part of the "investigative files and other materials" of the executive branch, to which § 4F(b) relates, because "grand jury minutes and transcripts are not the property of the Government's attorneys, agents, or investigators . . . , [but] are records of the court" (Pet. App. 6a n.4, *quoting United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 684-85 (1958) (Whittaker, J., *concurring*)).[5]

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[5] Serious constitutional issues relating to the separation of powers would be raised if Congress had actually intended to in-

(footnote continued)

Even if the phrase "investigative files and other materials" were construed to include grand jury materials, the automatic turn-over sought by petitioner would not be warranted because, as the Seventh Circuit correctly held, § 4F(b) authorizes disclosure only "to the extent permitted by law" (Pet. App. 9a). When Congress enacted § 4F(b), it was beyond dispute that Rule 6(e) prohibited disclosure of grand jury materials except upon a showing of particularized and compelling need. *See, e.g., United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959); *Dennis* v. *United States*, 384 U.S. 855, 872 (1966). As this Court recently stated, "it is always appropriate to assume that our elected representatives, like other citizens, know the law" (*Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979)), and that assumption is particularly appropriate where, as

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(footnote continued)
clude grand jury materials among those that the executive branch could turn over upon request (*see* Pet. App. 31a). The Seventh Circuit's construction is therefore also buttressed by the principle that legislation should be construed so as to avoid the necessity for ruling upon constitutional questions. *Johnson* v. *Robinson*, 415 U.S. 361, 366-67 (1974); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freights, Inc.*, 365 U.S. 127, 137-38 (1961). The decision below is further supported, of course, by the well-established presumption against implied repeals of existing law. *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978); *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842). Finally, § 4F(b), unlike Rule 6(e), is addressed solely to the Department of Justice, not to the courts. Thus, in determining the applicability of § 4F(b) to grand jury materials, the court of appeals correctly considered the longstanding principle that disclosure of grand jury materials is a matter exclusively within the discretion of the courts. *See, e.g., Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (1959).

here, the law at issue reflects a "policy . . . 'older than our Nation itself.'" *Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 399. Indeed, by including the phrase "to the extent permitted by law" within the text of § 4F(b), Congress affirmatively manifested its intention to preserve existing legal principles, as the opinion below well demonstrates (*see* Pet. App. 10a-15a).

The legislative history of § 4F(b) further shows that Congress did not intend, in enacting this section, to supersede existing law with respect to the disclosure of grand jury materials. To Senator Hruska's objection that § 4F(b) could turn the Department of Justice into a "massive document distribution center" (122 Cong. Rec. 29144 (1976)), Senator Abourzek, the floor manager of the bill, replied (*id.* at 29160):

> The section specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. Under existing law, he cannot turn over materials given in response to a grand jury demand . . . .

Given the power of the Seventh Circuit's analysis, which is firmly rooted in the language and legislative history of § 4F(b), it is not surprising that the great bulk of the petition here (as well as the briefs of the United States and the *amici curiae*) is devoted to policy arguments designed to show that petitioner should be granted rights to disclosure that Congress has not provided. Those arguments, which should be addressed to the legislative branch in any event, cast no doubt whatever on the correctness of the decision below. For instance, petitioner emphasizes (Pet. 11-12) that the intent of the Hart-Scott-Rodino Antitrust Improvements Act (of which § 4F(b) is a part)

was to expand the antitrust enforcement role of the states.[6] Both courts below fully recognized that fact (Pet. App. 15a, 34a), but rejected petitioner's conclusion that Congress therefore must have specifically intended § 4F(b) "to alter the standards for disclosure of grand jury materials" (Pet. App. 15a). Indeed, not only does the legislative history contain no mention of Rule 6(e), but it shows that Congress was not generally concerned with discovery issues when it enacted § 4F(b),[7] which was designed to give statutory force to a pre-existing informal federal practice of sharing investigative information—not including grand jury materials—with state officials (*see* Pet. App. 15a).

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[6] Congress empowered state attorneys general to bring *parens patriae* antitrust actions because it perceived that consumers had difficulty in prosecuting antitrust class actions (see § 4C of the Act, 15 U.S.C. § 15c). Congress also relaxed evidentiary standards for proving damages in such cases (§ 4D of the Act, 15 U.S.C. §15d), and further provided that aggregate damages could either be allocated among injured consumers or paid into the state treasury as a civil penalty (§ 4E of the Act, 15 U.S.C. § 15e). *See also* H.R. Rep. No. 499, 94th Cong., 2d Sess. at 6-8, *reprinted in* [1976] U.S. Code Cong. & Ad. News at 2576-77, 2583-84. Although these innovations significantly enhance the ability of state attorneys general to conduct civil antitrust litigation, it does not follow that Congress also intended, without so stating, to permit wholesale and automatic disclosure of grand jury materials. Indeed, it is beyond dispute that the Hart-Scott-Rodino Antitrust Improvements Act was "a limited legislative response to [a] perceived loophole in antitrust liability." Kintner, Griffin & Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 GEO. WASH. L. REV. 1, 19-20 (1977).

[7] The observation that individual consumers lacked investigative resources for uncovering possible antitrust conspiracies is the only reference in the legislative history that even remotely relates to discovery. See H.R. Rep. No. 499, 94th Cong., 2d Sess. 6-7, *reprinted* in [1976] U.S. Code Cong. & Ad. News 2575-76.

There is no merit to petitioner's major contention (Pet. 13-14) that the Seventh Circuit's construction of § 4F(b) will unduly impair antitrust enforcement.[8] Even under the Seventh Circuit's construction, a wide range of useful materials—including investigatory materials that have been presented to a grand jury (*see* Pet. App. 30a, 38a)—will be available to state attorneys general under § 4F(b).[9] Moreover, grand jury materials

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[8] That the court of appeals may have construed § 4F(b) in a way which, in petitioner's view, does not maximize antitrust enforcement in some theoretical sense is immaterial, of course, because the Seventh Circuit's construction of this section clearly reflects congressional intent as embodied in the language and legislative history of § 4F(b). *See* pages 7-9, *supra*.

[9] Petitioner seeks to minimize the importance of these materials, which the Second Circuit catalogued in *Cuisinarts*, *supra*, 665 F.2d at 31. Thus, petitioner asserted below (see Pet. App. 6a) that federal antitrust investigations are conducted "almost entirely" through the grand jury process. As a matter of fact, however, the Justice Department and F.B.I. staffs extensively investigate and analyze alleged antitrust violations. *See* J. Von Kalinowski, *16L Business Organizations: Antitrust Laws and Trade Regulations* at §§ 91.03-91.04; Mahaffie, *Criminal Antitrust Investigations*, 41 ANTITRUST L.J. 521 (1972); Steinhouse, *The Effect of Justice Department and FTC Cases on Private Antitrust Litigation*, 34 OHIO ST. L.J. 490, 492 (1973).

Moreover, even if petitioner were correct in its assertion that criminal antitrust violations are investigated "almost entirely" through the grand jury process, that "fact" would be immaterial to the proper construction of § 4F(b) unless Congress knew that to be the case in 1976, when it enacted this section. The court of appeals stated (Pet. App. 6a) that it had not been aware of this "fact", and the legislative history contains no suggestion that Congress was so aware in 1976. Indeed, Congress described the process of federal criminal investigation in quite different terms in 1977, when it considered proposed amendments to Rule 6(e): "Federal crimes are 'investigated' by the FBI, the IRS, or by Treasury agents and

(footnote continued)

will be available to state attorneys general, subject only to the traditional requirement that they demonstrate particularized and compelling need under Rule 6(e). On the other hand, the automatic and wholesale disclosure of grand jury materials that petitioner seeks would have a chilling effect on grand jury witnesses, thus undermining grand jury effectiveness and broader law enforcement goals.

The court of appeals carefully construed the language and legislative history of § 4F(b) in light of Rule 6(e) and the ancient policy of grand jury secrecy that this rule embodies.[10] The decision below is not only manifestly

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(footnote continued)
not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries." S.Rep. No. 354, 95th Cong., 1st Sess. 6 (1977).

If Congress simply misunderstood the manner in which criminal antitrust investigations are conducted, all the more reason exists for Congress, rather than this Court, to address the issues that petitioner seeks to present here.

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[10] Petitioner suggested below (C.A. Br. 42-43) that its construction of § 4F(b) was not incompatible with Rule 6(e) because the courts would continue under § 4F(b) to perform their traditional role of supervising the release of grand jury materials by means of protective orders. In terms, § 4F(b) does not provide any such authority. Moreover, the facts of this case, where petitioner is one of three named co-class representatives in two of five cases that have been consolidated in the district court, either totally or for discovery, demonstrate the inherent impracticability of enforcing such an order. Essentially, petitioner would be required to deny to its fellow class representatives the very materials that it claims to be necessary for conducting the litigation, while at the same time, petitioner's disclosure of those materials in preparation for depositions, briefs and other matters would seem inevitable.

correct, but it is extremely narrow. The court of appeals held only that petitioner's alleged entitlement to the *automatic* and *wholesale* turn-over of grand jury materials was neither consistent with Rule 6(e) nor mandated by § 4F(b).

## II.

## THERE IS NO DIRECT CONFLICT AMONG THE CIRCUITS ON THE ISSUES THAT PETITIONER SEEKS TO RAISE.

Petitioner contends (Pet. 10-11) that the decision below directly conflicts with the decisions in *United States* v. *Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), and *United States* v. *B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980). The holdings in those cases, however, are much narrower than petitioner suggests, and they do not support petitioner's assertion that it is entitled to the "wholesale" turnover of grand jury materials based upon only an "all encompassing, unparticularized demand" (Pet. App. 38a). Thus, there is no conflict among the circuits warranting review by this Court.

The question whether § 4F(b) covers grand jury materials was considered first by the Ninth Circuit in *United States* v. *B.F. Goodrich*, *supra*, in a brief *per curiam* opinion. A federal grand jury had investigated alleged violations of the antitrust laws, but had not returned an indictment. Thereafter, 16 states successfully petitioned the district court for disclosure of the grand jury materials. The Ninth Circuit affirmed, but imposed numerous express conditions, requiring both the consent of the Attorney General and the agreement of the states that the grand jury materials would be used "only to investigate or bring civil antitrust actions, . . . [not] in a criminal prosecution"

(619 F.2d at 801). Significantly, the Ninth Circuit also based its holding on the fact that its "examination of the record reveals that the material here sought was relevant" (*ibid.*).[11] This narrow decision can hardly be read as holding that § 4F(b) gives state attorneys general an unqualified right to grand jury materials, as petitioner here contends. The Ninth Circuit's decision is not in conflict with the decision below but, at most, represents a dubious application of Rule 6(e).[12]

The Fourth Circuit's holding in *United States* v. *Colonial Chevrolet Corp., supra,* is also narrowly circumscribed. Although the court concluded that § 4F(b) encompasses grand jury materials, it specifically held "only that . . . the State Attorney General, in his *parens patriae* capacity, has been relieved by Congress of the *initial burden of showing* a 'particularized need' as a basis for a grant of disclosure, and that the *burden of opposing* disclosure in such a situation rests on those who would deny disclosure" (629 F.2d

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[11] Unlike the present case, there was no criminal trial transcript in *United States* v. *B.F. Goodrich Co., supra,* or in *United States* v. *Colonial Chevrolet Corp., supra,* to assist the state attorneys general in demonstrating particularized need. Here, petitioner has access to three full trial records, and the district court was clearly correct in holding (Pet. App. 36a) that it is neither "unfair nor inequitable" in these circumstances to require petitioner, in the absence of particularized need, to obtain information through civil discovery. *See also* Note, *Disclosure of Grand Jury Materials Under Clayton Act Section 4F(b)*, 79 U. MICH. L. REV. 1234, 1257-68 (1981) (showing that state attorneys general have greatly exaggerated any need for grand jury materials).

[12] The Ninth Circuit's summary treatment of the issue clearly lacks the power to persuade. For instance, the panel noted that the legislative history is "equivocal" (619 F.2d at 800), but it did not even discuss the remarks of Senator Abourzek, the floor leader (122 Cong. Rec. 29160 (1976)). Also see page 9, *supra.*

at 951 (emphasis supplied)). The court emphasized that "[w]hether the showing by the opponents of disclosure is sufficient in any particular case to deny disclosure remains a matter for the discretion of the district judge . . . ." (*ibid.*). This decision, like *B.F. Goodrich Co.*, provides no support for petitioner's contention that § 4F(b) grants an "absolute" or unqualified right to grand jury materials.

A true conflict would arise if some future court were to construe § 4F(b) to require the Department of Justice to turn over grand jury materials without first obtaining a court order under Rule 6(e). At this time, no court of appeals has so held. Although the courts of appeals have understandably reached differing results in balancing the respective needs of the parties in different cases, there is at present no conflict warranting review.

## III.

## EVEN IF SOME INCIPIENT CONFLICT MIGHT EXIST, IT WOULD NOT NOW WARRANT REVIEW.

### A. Review By This Court Is Premature Because The Courts Of Appeals Have Not Settled Into A Clear Pattern Of Conflict.

In describing this Court's discretionary jurisdiction, Justice Harlan observed that "even where a 'true' conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals . . . ." Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTRALIAN L.J. 108, 112 (1959). In such circumstances, sound judicial administration counsels against early review by this Court. Four circuits have now had occasion to construe § 4F(b). The earliest opinion, that of the Ninth Circuit, gave only

summary consideration to these issues, and the Fourth Circuit decision clearly was influenced by the Ninth Circuit, which it recognized as "the only other United States Court of Appeals which [had] confronted this issue." *United States* v. *Colonial Chevrolet Corp., supra,* 629 F.2d at 950. Following the announcement of the decision below, however, the Second Circuit exhaustively considered these issues and adhered to the Seventh Circuit's reasoning in all respects. *See In re Grand Jury Investigation of Cuisinarts, Inc.,* 665 F.2d 24, 35 (2d Cir. 1981) (Kaufman, J.).[13]

Although four courts of appeals have now construed § 4F(b), the earliest of these decisions was rendered only in May 1980. Thus, whatever conflict now exists is not longstanding, and the two latest decisions, which are in agreement, reflect a more thorough analysis of the issues involved. At least two additional cases presenting these issues are now pending in the courts of

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[13] First, the Second Circuit held that grand jury materials are not "investigative files or other materials" within the meaning of § 4F(b) because grand jury materials are court records and not records of the executive branch (*id.* at 31). Second, the court agreed with the Seventh Circuit's conclusion that Congress included in § 4F(b) the phrase "to the extent permitted by law" in express recognition of the prevailing law under Rule 6(e), that grand jury materials may be disclosed only upon a showing of a particularized need. Like the Seventh Circuit, the Second Circuit believed that Congress would have expressly stated its intention to modify the well-settled law concerning disclosure of grand jury materials if it had actually intended to do so (*id.* at 34). Finally, the Second Circuit found that the legislative history of § 4F(b) affirmatively showed that Congress did not intend to alter existing law in this respect (*id.* at 34-35).

appeals,[14] including the Ninth Circuit, and these courts will soon have occasion to consider or reconsider these issues in light of the thorough opinions of the Seventh and Second Circuits. Given the force of the Seventh and Second Circuits' analysis, it is likely that a consensus will emerge, thereby eliminating any need for review by this Court.[15]

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[14] The Fifth Circuit has already heard argument on these issues in *In re Grand Jury Proceedings*, No. 81-1059 (5th Cir.). Likewise, in *Arizona* v. *United Dairymen of Arizona*, No. 80-245 (D. Ariz. 7/20/81), *appeal pending*, No. 81-5643 (9th Cir.), the Ninth Circuit will have an opportunity to reconsider these questions.

[15] Other courts are likely to reject the reasoning of the Fourth and Ninth Circuits, as did the Second Circuit (*see*, e.g., *Cuisinarts*, *supra*, 665 F.2d at 28, 35), on the ground that those decisions plainly involve judicial legislation. The courts in *B.F. Goodrich Co.* and *Colonial Chevrolet Corp.* largely based their decisions on perceived public policy—the "favored" role of state attorneys general in antitrust enforcement. The Ninth Circuit set aside the well-settled policy of grand jury secrecy on the basis of legislative history that it found "equivocal" at best and a congressional mandate that was, at most, "implied" (619 F.2d at 800-01). Moreover, both *B.F. Goodrich Co.* and *Colonial Chevrolet Corp.* gave inadequate consideration to the express language of § 4F(b) and declared an exception to Rule 6(e) that is nowhere to be found in any statute. Finally, both decisions ignore the substantial body of case law that confirms the independence of the grand jury and judicial control of grand jury materials. *See, e.g., Pittsburgh Plate Glass Co.* v. *United States*, *supra*, 360 U.S. at 398-99.

**B. Review By This Court Is Premature Because Congress May Well Resolve These Issues.**

As we have previously noted (see pages 15-17, *supra*), the alleged conflict among the circuits is not longstanding; the section at issue was enacted only in 1976, and the courts of appeals did not have occasion to construe it until May 1980, less than two years ago. Granting certiorari at the present time would be inappropriate not only because the courts of appeals may yet reach a consensus on the proper construction of § 4F(b), but also because Congress may well follow Judge East's suggestion that it "enact appropriate legislation setting forth its intention in the premises" (Pet. App. 18a). Further congressional action would be particularly appropriate in these circumstances.

The questions presented for review are questions of congressional intent that can be answered more easily and with greater certainty by Congress than by this Court. Petitioner's contention that Congress intended in 1976 to supersede fundamental principles of grand jury secrecy, without specifically stating any such intention, counsels strongly in favor of congressional resolution, as does the fact that Congress amended Rule 6(e) in 1977 without making any reference to § 4F(b), which (in petitioner's view) significantly altered the law of grand jury secrecy. Inasmuch as the Rules Committee of the Federal Judicial Conference has recently circulated proposed changes to Rule 6(e) for public comment (see 91 F.R.D. 289 (1981)), Congress will soon have another opportunity to address the general subject of grand jury secrecy and to clarify the meaning of § 4F(b). In these circumstances, review by this Court now would be premature.

## IV.

## THIS CASE IS NOT RIPE FOR REVIEW BECAUSE THE DECISION BELOW IS ESSENTIALLY INTERLOCUTORY.

This case is essentially interlocutory at this time because petitioner may still secure disclosure of the grand jury materials at issue by establishing particularized need, thus making it unnecessary for this Court to review the issues that petitioner now seeks to raise. Indeed, in denying petitioner's request without prejudice, the district judge stated (Pet. App. 39a):

> It is reasonable to anticipate that within a relatively short period of time following the filing of this memorandum, the petitioners herein will renew their petitions stating and demonstrating that they shall have then exhausted all of the feasible procedures for civil discovery and setting out in detail their remaining particularized needs.

Petitioner has now made numerous discovery requests in the civil cases.[16] In the event that petitioner exhausts its remedies in the district court and obtains the materials, the controversy will be moot. If, on the other hand, petitioner is still unable to secure the materials that it desires, it will then be able to raise these issues in this Court, together with any other issues that may then be available for review.

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[16] Moreover, although petitioner stated that it received only 18 pages of material in response to its § 4F(b) request, it should now have available the far more extensive materials "originally the property of the prosecutor or government investigator and voluntarily turned over by them to the Grand Jury," in that the District Court permitted that full disclosure (Pet. App. 32a).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 22, 1982

# Opposition

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CORRECTED COPY

No. 81-1114

FILED

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ALEXANDER L. STEVAS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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STATE OF ILLINOIS,

*Petitioner,*

vs.

ABBOTT & ASSOCIATES, INC., Et Al,

*Respondents.*

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## MEMORANDUM OF CLIMATEMP, INC. AND VICTOR COMFORTE IN OPPOSITION

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# In the Supreme Court of the United States

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## No. 81-1114

**STATE OF ILLINOIS,**

*Petitioner,*

vs.

**ABBOTT & ASSOCIATES, INC., Et Al.,**

*Respondents.*

## MEMORANDUM OF CLIMATEMP, INC. AND VICTOR COMFORTE IN OPPOSITION

### PARTIES BELOW

Petitioner is the State of Illinois by its Attorney General, Tyrone C. Fahner. The complaint was filed on behalf of the State of Illinois, the Chicago Board of Education, and all other public entities similarly situated.

These respondents are Climatemp, Inc. and Victor Comforte. Climatemp, Inc. is an Illinois corporation, and Victor Comforte is the President of that corporation.

## STATEMENT OF THE CASE

On June 12, 1978, a 13-count indictment was returned by the August 1977 Grand Jury sitting in the Northern District of Illinois at Chicago, Illinois. The case was entitled *United States* v. *Climatemp, Inc., et al.*, No. 78 CR 388. It charged 19 corporations, 13 individuals and a labor union with conspiracy to rig bids on public sheet metal projects in the Chicago area in violation of Title 15 U.S.C. §1 and 18 U.S.C. 1341. Climatemp, Inc. and Victor Comforte were defendants in this case.

On March 8, 1980, Climatemp, Inc. and Victor Comforte were found not guilty of all charges in the indictment.

This case has nothing to do with the so-called piping investigation and two other indictments returned in 1979. Those cases are referred to in petitioner's brief as *United States* v. *S. J. Reynolds Co., Inc., et al.*, No. 79 CR 66 and *United States* v. *Borg, Inc., et al.*, No. 79 CR 67, and did name or refer to either Climatemp, Inc. or Victor Comforte.

## REASONS FOR NOT GRANTING THE WRIT

Petitioner, State of Illinois, argues that the decision of the Seventh Circuit Court of Appeals in this case is in conflict with the decisions of the Fourth Circuit in *United States* v. *Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 101 S.Ct. 1352 (1981) and the Ninth Circuit in *United States* v. *B. F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980). Supreme Court Rule 19 states that a Writ of Habeas Corpus may issue when a Court of Appeals has rendered a decision in conflict with another Court of Appeals "on the same matter". The Rule also states that "a review on a Writ of Certiorari is not a matter of right, but of sound judicial discretion. . .". The

alleged conflict exists between the decision in this case, *In Re State of Illinois Petition to Inspect and Copy Grand Jury Materials*, 659 F.2d 800 (7th Cir., 1981) and the decision of the Second Circuit in *In Re: Grand Jury Investigation of Cuisinart, Inc.*, ..... F.2d ..... (2nd Cir., 1981) Slip Op. No. 81-7338 (2nd Cir. Nov. 19, 1981) on the one hand, and the decisions of the Ninth and Fourth Circuits in *United States* v. *B. F. Goodrich*, 619 F.2d 798 (9th Cir. 1980) and *United States* v. *Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 101 S.Ct. 1352 (1981).

The latter two decisions, *United States* v. *B.F. Goodrich, supra*, and *United States* v. *Colonial Chevrolet, supra*, are clearly distinguishable from the decision of the Seventh Circuit in this case. In *B.F. Goodrich, supra*, the Grand Jury had returned no indictments. In *Colonial Chevrolet, supra*, all the defendants had pleaded *nolo contendere*. In neither case was there a trial. In this case there was a trial and the resultant public record regarding the antitrust violations alleged in the complaint filed by the State of Illinois. Nine of the defendants, including Climatemp, Inc. and Victor Comforte, denied their guilt and went to trial. Climatemp, Inc. and Comforte were found not guilty of all charges in the criminal case. During the course of that criminal proceeding, numerous witnesses testified concerning the allegations contained in this complaint and hundreds of documents were admitted into evidence. A transcript of those proceedings, as well as the documents, are available to the State of Illinois and its counsel. Similar materials were not available to the plaintiffs in *B. F. Goodrich* or *Colonial Chevrolet*.

An additional observation should be made concerning *United States* v. *Colonial Chevrolet, supra*. Although it states it does away with the "particularized need" doctrine for State Attorney Generals in *parens patriae* actions, it arrives at a balancing test regarding disclosure. The de-

cision places the burden on those opposing disclosure and balances those reasons against what it recognizes as an obvious need of the State Attorney General in *parens patriae* actions. Thus, the result reached in *Colonial* effectively maintains the particularized need test in the circumstances of that case, i.e., no public record regarding the allegations and/or judicial admissions (guilty pleas). In effect, the court in *Colonial* found a particularized need in the circumstances of that case. Similarly, the Ninth Circuit in *United States* v. *B.F. Goodrich, supra,* addresses the question of the State of California's need. The court concludes that in the circumstances of that case that the need outweighs any need for secrecy and agrees with the District Court in effectively finding a specific need ("particularized need") to exist. *United States* v. *B.F. Goodrich,* 619 F.2d 798, 801 (9th Cir. 1980).

Although the petitioners have identified two issues for consideration by this court, they appear to state on page 9 of their brief that the only issue is the proper construction of §4F(b), Title 3, of the Harte-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. §15f(b). The issue is not that broad. The question of the availability of Grand Jury transcripts is so interrelated with the circumstances of each case and, indeed, the needs of the plaintiff, as to make the issue much narrower. The question is, in the circumstances of this case, whether the petitioners must establish or the court must find a "particularized need" before ordering disclosure. The issue presented by petitioners is not stated with sufficient clarity as to warrant Supreme Court consideration. *Pflueger* v. *Sherman,* 293 U.S. 55 (1934). *Kimbrough* v. *United States,* 364 U.S. 661 *reh. den.* 365 U.S. 825 (1961).

These four cases represent the first four interpretations of this statute. It should be noted that no court has re-

jected the reasoning of the Seventh Circuit in this case or the Second Circuit in *Cuisinart* since they have been published. Those decisions are correct in their conclusion and extremely well-reasoned in their analysis of the issue and statute. There can be little doubt that the Harte-Scott-Rodino Antitrust Improvement Act was an attempt to help private plaintiffs who were injured by antitrust activity. However, there is no discussion in the legislative history of that legislation which indicates that it attempted to change long-standing rules regarding the discovery of Grand Jury materials. The decisions of the Seventh and Second Circuits rested their decisions on sound and established law of the various circuits, as well as the Supreme Court. In fact, the Supreme Court decisions in *Douglas Oil* v. *Petrol Stops N.W.*, 441 U.S. 211 (1979), *Dennis* v. *United States*, 384 U.S. 855 (1966), and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959), left no room for discretion. *Hendricks* v. *N.L.R.B.*, 627 F.2d 766 (7th Cir. 1980).

Even should this court determine that there presently is a difference between the circuits, this case is an inappropriate vehicle for resolution. Given the distinguishing characteristics of each case, and the failure of any court to subsequently reject the reasoning of the Seventh Circuit in this case or the Second Circuit in *Cuisinart*, this matter should be left to a determination on a case by case basis. This is especially true given the fact that the decisions of the Ninth and Fourth Circuits in *B.F. Goodrich*, *supra*, and *Colonial*, *supra*, essentially allow discovery on the basis of a specific articulated need by the State attorney Generals in those cases, which cases are significantly different from this case.

The State of Illinois and its counsel, the Illinois Attorney General, has available to it a trial transcript contain-

ing the testimony of over 30 witnesses, including some of the defendants, and numerous documents, all of which are part of the criminal trial record. Whereas the plaintiffs in those two cases, and their counsel, the respective Attorneys Generals, had neither. It may be that some time in the future under different circumstances the State of Illinois would, as a matter of right, be entitled to the Grand Jury materials. Like the circumstances in *United States* v. *Colonial Chevrolet, supra,* and *United States* v. *B. F. Goodrich, supra,* those circumstances would probably rise to a level of particular need.

## CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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January, 1982

# Amicus Brief

Office - Supreme Court, U.S.
FILED
DEC 16 1981
ALEXANDER

No. 81 - 1114

IN THE

# Supreme Court of The United States

October Term, 1981

STATE OF ILLINOIS,

*Petitioner,*

v.

ABBOTT & ASSOCIATES, INC., *et al.*,

*Respondents.*

**BRIEF OF THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS AND VIRGINIA, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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STATE OF ILLINOIS,

Petitioner,

v.

ABBOTT & ASSOCIATES, INC., et al.,

Respondents.

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# BRIEF OF THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS AND VIRGINIA, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

The States of Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island and Providence Plantations, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming, the Commonwealths of Kentucky, Massachusetts and Virginia, and the District of Columbia (hereinafter "the States"), as amici curiae, respectfully submit this brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed by the State of Illinois.

## INTEREST OF THE AMICI CURIAE

As representatives of their citizens and as purchasers in their own right of a wide variety of goods and services, the States have a strong interest in the maintenance of a market system free of unlawful restraints of trade. Congress and the courts have recognized accordingly that the States, in partnership with the United States, bear a substantial responsibility for the enforcement of the antitrust laws.

The significance of the States' role in antitrust enforcement has been enhanced by Congress in recent years. In Title III of the Hart-Scctt-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c-15h, Congress authorized State attorneys general to represent consumers in parens patriae treble damage actions. In another act passed during the same legislative session, Congress provided for $30 million of federal funding for State antitrust enforcement programs. 42 U.S.C. § 3739.

Recently, Congress reaffirmed the special role of the States in antitrust enforcement by providing in the Federal Trade Commission Improvements Act of 1980 that the Federal Trade Commission may disclose to State attorneys general all information gathered by the Commission during its investigations. 15 U.S.C. § 46(f). As a result of these enactments, State attorneys general occupy "a place adjunct to that of the Attorney General himself, in the scheme of enforcement of the federal antitrust laws ...." United States v. Colonial Chevrolet Corp., 629 F.2d 943, 950 (4th Cir. 1980), cert. denied, 101 S.Ct. 1352 (1981); see also United States v. B.F. Goodrich Co., 619 F.2d 798, 801 (9th Cir. 1980). In sum, it is clear that the States have both a fundamental interest and an essential role in enforcement of the federal antitrust laws.

The issue presented in this matter -- whether Congress, in enacting 15 U.S.C. § 15f(b), intended that State

attorneys general should have enhanced rights of access to federal grand jury materials in antitrust cases -- is one which has a substantial impact upon the capability of the States to fulfill their role in the antitrust enforcement scheme and to protect themselves and their citizens from unredressed violations of the federal antitrust laws. Resolution of this issue affects each of the States as much as it does the petitioner, State of Illinois. Accordingly, the amici curiae have a direct and substantial interest in this proceeding.

## ARGUMENT - REASONS FOR GRANTING THE WRIT

### I.

### The Courts of Appeals Which Have Considered The Issue Are Divided

The decision of the Court of Appeals for the Seventh Circuit is in direct conflict with prior decisions of the Fourth and Ninth Circuits in United States v. Colonial Chevrolet Corp., 629

F.2d 943 (4th Cir. 1980), cert. denied, 101 S.Ct. 1352 (1981), and United States v. B.F. Goodrich Co., 619 F.2d 798 (9th Cir. 1980). Both the Fourth and Ninth Circuits held that Congress, in enacting 15 U.S.C. § 15f(b), intended to enhance the right of State attorneys general to seek disclosure of federal grand jury materials in antitrust cases by allowing them access to the materials without the strict showing of "particularized need" normally required of private litigants. The Seventh Circuit, however, rejected the reasoning and holdings of the Fourth and Ninth Circuits. More recently, the Second Circuit reached the same conclusion as the Seventh Circuit. In Re: Grand Jury Investigation of Cuisinarts, Inc., No. 81-7338 (2d Cir. Nov. 19, 1981). The clear division of authority among the circuits, which parallels a similar division in the district courts, presents a substantial conflict which is appropriate for the Court to resolve.

## II.

### The Issue Presented Raises an Important Question Of Federal Law Which Should be Settled By The Court

The States, as noted, have been granted a special role in enforcement of the federal antitrust laws. To that end, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 directs the United States Department of Justice to cooperate fully with State attorneys general in antitrust matters. 15 U.S.C. § 15f; see H.R. No. 94-499, 94th Cong., 2d Sess. 17 (1975). The Fourth and Ninth Circuits held that Congress, in order to strengthen the antitrust enforcement capabilities of the States, intended to relieve State attorneys general of the burden of showing "particularized need" as a prerequisite for disclosure of grand jury materials. The Second and Seventh Circuits have taken the contrary position, holding that Congress did not intend State attorneys general to be treated

differently from any private litigant who seeks access to grand jury materials under Federal Rule of Criminal Procedure 6(e). These decisions, which restrict the States' ability to obtain the benefits of prior federal investigative efforts, have a critical impact upon the States' ability to perform the antitrust enforcement role which Congress contemplated. Thus, the question presented in this case is an important one affecting enforcement of the federal antitrust laws.

The matter also presents a significant question concerning the proper scope of grand jury secrecy under Federal Rule of Criminal Procedure 6(e) following enactment of 15 U. S. C. § 15f(b). Whether Congress intended the Hart-Scott-Rodino Antitrust Improvements Act of 1976 to modify the usual standards for grand jury disclosure involves a significant statutory and policy analysis which properly should be resolved by the Court.

## CONCLUSION

The issue which the State of Illinois seeks to present to the Court is a substantial one, upon which the lower courts are divided, and which has a significant impact upon the States and upon antitrust enforcement. For these reasons, the amici curiae States support the State of Illinois in requesting that its Petition for a Writ of Certiorari be granted.

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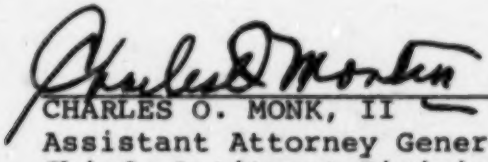
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December, 1981, three copies of the Brief of Amici Curiae in Support of the Petition for a Writ of Certiorari were mailed, postage prepaid, to Stephen P. Juech, Esquire, Assistant Attorney General, Antitrust Division, 188 W. Randolph Street, Suite 2118, Chicago, Illinois 60601, counsel for the State of Illinois, and to Mark Del Bianco, Esquire, United States Department of Justice, Appellate Section, 10th and Pennsylvania Avenues, N.W., Washington, D.C. 20530. Additionally, forty (40) copies of the Brief have been mailed, postage prepaid, to the Clerk of the United States Court of Appeals for the Seventh Circuit for service upon the respondents.



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# Petitioner's Brief

Office - Supreme Court U.S.
FILED
JUN 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1114

# In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ILLINOIS,

*Petitioner,*

vs.

ABBOTT & ASSOCIATES, INC., et al.,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED DECEMBER 15, 1981**
**CERTIORARI GRANTED MARCH 22, 1982**

Printed by the Authority of the State of Illinois — 6-4-82

## QUESTIONS PRESENTED

1. WHETHER GRAND JURY MATERIALS IN THE POSSESSION OF GOVERNMENT ATTORNEYS WHICH WERE GENERATED DURING THE COURSE OF A FEDERAL ANTITRUST INVESTIGATION ARE "INVESTIGATIVE FILES OR OTHER MATERIALS" WITHIN THE MEANING AND PURPOSE OF SECTION 4F(b) OF THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT.

2. WHETHER SECTION 4F(b) SHOULD BE READ IN HARMONY WITH RULE 6(e) TO PERMIT DISCLOSURE OF GRAND JURY MATERIALS TO STATE ATTORNEYS GENERAL UNDER APPROPRIATE CIRCUMSTANCES WITHOUT A SHOWING OF PARTICULARIZED NEED.

## LIST OF PARTIES

Petitioner is the State of Illinois, by its Attorney General, Tyrone C. Fahner. Certain respondents are corporations and individuals named as defendants in two federal treble damage antitrust actions brought by the State of Illinois and currently pending in the Northern District of Illinois[1]. Other respondents are corporations and individuals who either submitted documents or provided testimony to the August 1977 Grand Jury of the Northern District of Illinois but were not named as defendants in the treble damage actions. The State of Illinois does not know the exact number and identity of all of these respondents. Because of the grand jury secrecy questions presented by this case, both the district court and the court of appeals as well as this Court ordered their respective dockets for this case suppressed and permitted respondents to file their appearances under seal. (*See* Pet. App. 23a, 40a; J.A. 15.)

The United States of America is also a respondent. The United States supports the State of Illinois' petition for disclosure.

The following corporate and individual respondents are, to the knowledge of the State of Illinois, parties in this case:

> Abbott & Associates, Inc.; Eugene Abbot; Anderson & Litwack Company; James Anderson; Mid-City National Bank as Executor for the Estate of Harvey Anderson; Reliable Sheet Metal Works, Inc.; Melvin Fakter; W. Wanzenberg & Company; Henry C. Wanzenberg; Pullman Sheet Metal Works, Inc.; Lester Goldwin; F.E. Moran, Inc.; Owen Moran; Byness, Inc.; James Connor; Dennis

---

[1] *State of Illinois v. Climatemp, Inc., et al.*, 79 C 4898 (N.D.Ill.); *State of Illinois v. Borg, Inc., et al.*, 79 C 5253 (N.D.Ill.).

Dams; The Narowetz Company; Robert Moon; Gideon Engineering Corp.; Admiral Heating & Ventilating, Inc.; Ronald Litt; Moto Heating-Ventilating-Air Conditioning Corp.; Borg, Inc.; Ideal Heating Company; C.W. Johnson, Inc.; Windsor Heating Company; Bellis-Hanley, Inc.; Beverly Heating Company; Grigus, Inc.; Hans Jensen & Sons, Inc.; Illinois Heating & Ventilating Company; Kelleher, Inc.; Mehring & Hanson-Wendt, Inc.; National Heat & Power Company, Inc.; Northwestern Industrial Piping, Inc.; Piping Systems, Inc.; Voris, Inc.; Economy Mechanical Industries, Inc.; S.J. Reynolds Company, Inc.; Phillips, Getschow Company; Howard Salzman; Edward W. Usher; Charles W. Blodgett; Everett H. Janke; Clemens E. Sharp; Robert F. Lawinger, Jr.; Walter S. Hojka, Jr.; Edward Grigus; Robert H. Jensen; Gerald A. Kelly; Thomas E. Kelleher; Robert I. Nash; Harold Hurvitz; Joseph S. Kearney, Sr.; Joseph S. Kearney, Jr.; Robert E. Curran; William J. Voris; Elmer P. Bruksch; Lee E. Getschow; Stanley B. Bellis; Sheet Metal Workers, International Association, Local 73; Evco Associates, Inc.; Robert Irsay Co.; Wagner Heating & Ventilating Co.; Zack Company; R.A. Martin Co., Inc.; Mellish & Murray Co.; AC Company; Steel City Ventilating & Sheet Metal Co.; Crone Associates; Hunter Clark Ventilating Co.; Donald Lewis; John Eiself; Robert Freiny; Charles L. Howard; Gideon Goldschmidt; Richard S. Wise; Robert Ahrenhold; Kenneth Gardner; H. James Murray; John J. Coogan; William Black; Raymond J. Lyons; Gene Bednarz; Leonard Wendt; Climatemp, Inc.; Victor Comforte.

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No. 81-1114

# In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ILLINOIS,

*Petitioner,*

vs.

ABBOTT & ASSOCIATES, INC., et al.,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## BRIEF FOR THE PETITIONER

## OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 659 F.2d 800 (7th Cir. 1981) and are printed as Appendix A to Petition for Writ of Certiorari (hereinafter "Pet.App.") pp. 1a-18a; 21a. The decision of the district court is reported in 1980-81 Trade Cases (CCH) Par. 63,771 at 78,103 (N.D.Ill.) and appears as Appendix F, Pet.App., pp. 26a-39a.

## JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1981. On September 30, 1981, the panel opinion was modified to reflect that it had been circulated among all circuit judges in regular active service, none of whom favored rehearing *en banc*. The petition for a writ of certiorari was filed on December 15, 1981 and granted on March 22, 1982. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

## STATUTE AND RULE INVOLVED

Hart-Scott-Rodino Antitrust Improvements Act of 1976, Title III, Section 4F (15 U.S.C. Sec. 15f):

> (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under Sections 12 to 27 of this title based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.
>
> (b) To assist a State attorney general in evaluating the notice or in bringing any action under Sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under Sections 12 to 27 of this title.

Rule 6(e)(3)(C), Federal Rules of Criminal Procedure, provides in pertinent part:

> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made:
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding . . .
>
> If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in su ' manner, at such time, and under such conditions as the court may direct.

## STATEMENT OF THE CASE

In December 1976, the Antitrust Division of the United States Department of Justice began a grand jury investigation in the Southern District of Illinois concerning possible criminal violations involving the mechanical construction trades in Illinois. In August 1977, this investigation was transferred and continued before a grand jury in the Northern District of Illinois where, pursuant to subpoena, numerous documents were produced and many witnesses testified. During the course of these proceedings, the Antitrust Division determined that there were actually two separate conspiracies under investigation: one involving the sheet metal construction trade and the other involving the piping construction trade.

On June 12, 1978, the grand jury concluded its sheet metal investigation with the return of a 13-count indictment charging 19 corporations, 13 individuals and a labor union with conspiring to rig bids on public sheet metal projects in the Chicago area in violation of the Sherman Act, 15 U.S.C. Sec.

1, and the mail fraud statutes, 18 U.S.C. Sec. 1341, *et seq. United States v. Climatemp, Inc., et al.*, 78 CR 388 (N.D. Ill.).

On January 31, 1979, the piping investigation was concluded with the return of two single count indictments charging 21 corporations and six individuals with conspiring to rig bids on public and private piping construction projects in the Chicago area in violation of the Sherman Act and mail fraud statutes. *United States v. Borg, Inc., et al.*, 79 CR 67 (N.D. Ill.); *United States v. S. J. Reynolds Co., Inc., et al.*, 79 CR 66 (N.D. Ill.).

During the course of the criminal proceedings, grand jury transcripts and documents were disclosed to numerous defendants and witnesses. Each defendant who testified before the grand jury was offered his own testimony for inspection under Rule 16, Fed.R.Crim.P. In the case of corporate defendants, this included the testimony of present and former officers and employees. Additionally, most of the witnesses who testified in the trials were provided with a copy of their testimony before the grand jury. Prior to the *Climatemp* trial, the government provided counsel for the eight defendants who went to trial with copies of the grand jury testimony of 17 prospective trial witnesses. Disclosure of testimony in *Borg-Reynolds* was even broader since all of the grand jury testimony which related to the piping case was made available for inspection.

All proceedings in the criminal cases have now been terminated. Of the 59 defendants indicted in the three cases, all but nine were convicted on pleas of *nolo contendere* and sentenced. Nine defendants stood trial, four were convicted and sentenced. The Department of Justice has indicated that it does not intend to take further action based upon the information developed in either the sheet metal or piping investigations. *See Memorandum of United States,* at 6, filed May 19, 1980 (No. 80 C 0888, N.D. Ill.).

On October 17, 1978, after receiving notice of the *Climatemp* indictment from the United States Department of

Justice pursuant to 15 U.S.C. Sec. 15f(a), the Illinois Attorney General requested from the United States all "investigative files or other materials" relating to the conspiracy charged in the indictment pursuant to 15 U.S.C. Sec. 15f(b) ["Section 4F(b)"]. (J.A. 4-7). In response, the United States provided the State with only 19 pages of staff memoranda, none which dealt specifically with the grand jury investigation in the Northern District of Illinois.[2] The United States advised that all other materials within the scope of the State's Section 4F(b) request were grand jury materials subject to the provision of Rule 6(e), Fed.R.Crim.P. (J.A. 9). No additional information was disclosed to the State in response to its similar request in the *Borg-Reynolds* cases.

On November 21, 1979 and December 14, 1979, the State of Illinois filed two class action lawsuits under the Clayton Act, 15 U.S.C. Sections 15 and 26, on behalf of itself, the Chicago Board of Education, and all other public entities similarly situated in Illinois. *State of Illinois v. Climatemp, Inc., et al.*, 79 C 4898 (N.D. Ill.), *State of Illinois v. Borg, Inc., et al.*, 79 C 5253 (N.D. Ill.). A total of 86 defendants, including all those indicted in the criminal cases were named in the civil suits. Those suits alleged bid-rigging and price fixing conspiracies on the sheet metal and piping phases of Chicago area public building projects respectively.

On January, 31, 1980, the State of Illinois petitioned the district court for the Northern District of Illinois for disclosure of grand jury materials pursuant to Section 4F(b) and Rule

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[2] The bill of particulars filed by the Department of Justice in *Climatemp*, however, indicated that at least 80 public building projects were subject to the sheet metal conspiracy during the period 1963 to 1976. In *Borg*, the bill of particulars noted that at least 108 construction projects were subject to the piping conspiracy during the period between 1956 and 1977.

6(e), Fed.R.Crim. P. (J.A. 11). The Department of Justice supported the State's application for a court order releasing these materials. On January 7, 1981. Chief Judge James B. Parsons denied the State's petition, ruling that Section 4F(b) did not apply to materials acquired by and belonging to the grand jury, and required the State of Illinois to demonstrate a particularized need for disclosure of the requested materials, (Pet.App. 26a). The State appealed from that portion of the district court's order which denied the Illinois Attorney General access to grand jury materials under Section 4F(b).

On September 16, 1981, the United States Court of Appeals for the Seventh Circuit affirmed by a 2-1 vote (Pet.App. 1a), Refusing to follow the decisions of the Fourth and Ninth Circuits in *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied,* 450 U.S. 913 (1981), and *United States v. B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980), the Court of Appeals questioned whether grand jury materials were within the "investigative files or other materials" language of Section 4F(b), 659 F.2d at 802. In any event, the court concluded that Section 4F(b) did not dispense with the State's need to demonstrate particularized need. 659 F.2d at 802. In dissent, Judge East adopted the holdings of *Colonial Chevrolet* and *B.F. Goodrich* and recognized Congress' intent to strengthen antitrust enforcement through increased federal-state cooperation and coordination of enforcement efforts. 659 F.2d 808-809.

## SUMMARY OF ARGUMENT

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 represents the most far-reaching expansion in the nature of antitrust enforcement since the Clayton Act of 1914. Section 4F(b) is an essential component of a broad Congressional scheme conferring upon state attorneys general special

authority and responsibility to enforce our nation's antitrust laws.

The statute and its legislative history clearly demonstrate that an increase in coordination and cooperation between the federal and state antitrust enforcers to facilitate increased enforcement by the states was a fundamental objective of Congress. To that end, Section 4F(b) mandates that "any investigative files or other materials" generated during the course of a federal antitrust investigation should be made available "to the extent permitted by law."

Neither the plain language of the statute nor its pertinent legislative history contradicts the conclusion that grand jury materials are part of the "investigative files or other materials" of the Department of Justice. In fact, in the antitrust investigative context, such materials form the very essence of the files or other materials in the possession of the government attorneys.

As pointedly demonstrated by this case, despite the massive federal grand jury investigation of bid rigging on public building projects, only 19 pages of materials generated prior to the institution of the grand jury were made available to the Illinois Attorney General. Even the Seventh Circuit recognized that its own interpretation of the statute would compromise the express objectives of Congress.

Section 4F(b) also provides that relevant materials are to be made available "to the extent permitted by law". The most authoritative source for the meaning of that language is contained in the legislative history of an earlier version of the House bill where Section 4F(b) originated. The House Report provides that such materials are to be made available "except where specifically prohibited". Rather than specifically prohibiting disclosure, Rule 6(e) explicitly permits disclosure under appropriate circumstances where the need for

disclosure is compelling and outweighs the reasons for secrecy which remain.

In order to give effect to the clearly stated Congressional directive and purpose of Section 4F(b), the standard for state attorneys general under these special circumstances is different from the standard employed in *Douglas Oil* and its progenitor. Those cases involved an analysis of requests by private parties to further private litigation interests. In that context, this Court determined that the need for disclosure to a private party must be stated with particularity.

However, the competing interests to be resolved under requests authorized by Congress pursuant to Section 4F(b) are both of a public nature. Section 4F(b) and Rule 6(e) therefore must be read in a complementary fashion to effectuate both the policy of secrecy and the Congressional purposes of Hart-Scott-Rodino.

The question of disclosure is one firmly committed to the discretion of the courts in accordance with Congressional directives that disclosure is appropriate in a given situation. As the chief law enforcement officer of his state, the state attorney general is charged under Title III with the responsibility to enforce the antitrust laws and seek redress on behalf of public interests. Accordingly, state attorneys general were elevated to a status different from private parties, adjunct to the United States Attorney General in the Congressional scheme of antitrust enforcement. Thus, where the state attorney general is proceeding under the authority of Section 4F(b), Congress has resolved the public interest considerations in such a case and has relieved that official of establishing particularized need as a threshold to disclosure.

In the present case, the interests of secrecy have been substantially reduced given the termination of all criminal proceedings and the widespread disclosure to the defendants.

Under such circumstances, the need for disclosure under Hart-Scott-Rodino is compelling, and the requested disclosure should be made subject to judicial supervision invoking proper protective limitations and providing an opportunity to those who may oppose disclosure to be heard.

The Seventh Circuit failed in its analysis both to protect the remaining policy interests in secrecy and, to respect the stated purposes of Congress in effective national antitrust enforcement.

## ARGUMENT

## I.

## INTRODUCTION

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub.L. 94-435, 90 Stat. 1383, was enacted to secure for the citizens of this nation strong and effective enforcement of the antitrust laws.[3] In passing Title III of Hart-Scott-Rodino, and companion legislation authorizing the appropriation of thirty million dollars to develop or enhance state antitrust enforcement capabilities, 42 U.S.C. Section 3739, Congress clearly recognized the important role that state attorneys general could serve in assuring compliance with the antitrust laws.

Pervasive throughout Title III is the recognition by Congress that criminal investigations and prosecutions by the

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[3] Title I of the Act granted CID powers to the United States Department of Justice. 15 U.S.C. Sec. 1311 *et seq.* Title II provided for premerger notification. 15 U.S.C. Sec. 18a *et seq.* Title III provided, *inter alia,* for the institution of *parens patriae* antitrust actions by state attorneys general. 15 U.S.C. Sec. 15c-15h.

United States must be accompanied by civil enforcement actions for treble damages by the states under Sections 4 and 4C of the Clayton Act, 15 U.S.C. Sections 15, 15c, in order to effectuate the policies of the antitrust laws. Congress also foresaw that "[a]n extremely important benefit which would flow from [Hart-Scott-Rodino] is the promotion of cooperation in antitrust enforcement between the States and the federal government." H.Rep. No. 94-499, 94th Cong., 2d Sess. 5 (1975), [hereinafter "House Report"].

Section 4F of Title III, 15 U.S.C. Section 15f, delineates the nature of the federal-state antitrust partnership:

> (a) Whenever the Attorney General of the United States has brought an action under the Antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under Sections 12 to 27 of this title based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.
>
> (b) To assist a State attorney general in evaluating the notice or in bringing any action under Sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under Sections 12 to 27 of this title.

Section 4F(b) is a clear Congressional directive that tax dollars ought not and need not be used to conduct complicated antitrust investigations twice. In appreciation of the superior investigative powers of the federal government, and of the limited resources of the states, Congress passed Section 4F(b)

so that the states could receive all relevant information generated by the federal government in its antitrust investigation without having to spend substantial time and money duplicating work already done. *See* House Report at 17.

Section 4F(b) is also a Congressional acknowledgement that the disclosure which it commands must accomodate the policy of grand jury secrecy embodied in Rule 6(e) of the Federal Rules of Criminal Procedure. In directing the Government to release to the states investigative files or other materials "to the extent permitted by law," Congress recognized that disclosure of certain materials covered by Section 4F(b), i.e., grand jury materials, would require a court order. Contrary to the conclusion of the Seventh Circuit, however, the policy embodied in Section 4F(b) requires that pursuant to Rule 6(e), the judiciary disclose grand jury materials to state attorneys general under a different standard than the traditional showing of particularized need. A host of federal decisions have so held.

The Court of Appeals rejected this practical construction of Section 4F(b) and, in so doing, emasculated the purpose of the statute. As a consequence of the decision below, the State of Illinois must engage in the type of redundant and expensive investigatory effort which Congress sought to abolish in passing Title III. Moreover, the constituency which Congress meant to benefit by passing Title III, in this case the people of the State of Illinois, is further hindered in obtaining the relief they are entitled to under the antitrust laws.

The requested disclosure of grand jury materials under Section 4F(b) presents two issues of statutory construction. First, whether grand jury materials are encompassed within Section 4F(b)'s "investigative files or other materials" language. Second, assuming that they are, what is the effect of the "to the extent permitted by law" language in light of Rule 6(e).

Upon analysis of the statute and its legislative history, the conclusion is inescapable that grand jury materials are within Section 4F(b) and that the statute should be read in harmony with Rule 6(e) to permit discreet disclosure of grand jury materials to state attorneys general under appropriate circumstances without the showing of particularized need.

## II.

## THE PLAIN LANGUAGE OF SECTION 4F(b) — "ANY INVESTIGATIVE FILES OR OTHER MATERIALS" — CLEARLY INCLUDES ALL MATERIALS DEVELOPED IN THE FEDERAL ANTITRUST INVESTIGATION, INCLUDING GRAND JURY MATERIALS

The Court of Appeals "doubted" that the broad and expansive language "any investigative files or other materials" includes grand jury materials. The court's reasoning is irreconcilable with the plain language of the statute and ignores the practical realities of federal antitrust investigations. Moreover, in conflict with numerous decisions construing Section 4F(b), the conclusion of the Seventh Cirucit reflects an insensibility to the very purposes of the Hart-Scott-Rodino Act itself: the promotion of state and federal cooperation is strong and effective antitrust enforcement.

### A. The Court's Conclusion Disregards The Plain Language Of Section 4F(b).

In part, the Seventh Circuit's concern apparently rests upon the fact that grand jury materials are not specifically mentioned in the statute. 659 F.2d at 802. Such reasoning, however, is contrary to sound statutory construction. The

language of Section 4F(b) is intentionally broad and sweeping. It mentions no specific part of the investigative files or other materials, but refers instead to "any investigative files or other materials . . . which are or may be relevant to an actual or potential cause of action." The plain language of the statute includes grand jury materials since they are part of the files maintained by the government during and after antitrust investigations. As this Court recently reiterated: "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Products Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Moreover, it is the function of the courts to give meaning to the plain language of a statute, not to carve out exceptions to purposefully expansive language. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979); *United States v. Menasche*, 348 U.S. 528, 538 (1955). *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543, 544 (1940).

### B. The Court's Conclusion Disregards The Practical Realities Of Federal Antitrust Investigations.

The practical realities and experience in federal antitrust investigations compels the conclusion that grand jury materials are part and parcel of the "investigative files or other materials" of the Antitrust Division of the Department of Justice (hereinafter, "Antitrust Division"). The manner in which grand juries are used by the United States in conducting antitrust investigations stands in sharp contrast to the lower court's conclusion that grand jury transcripts, documents and materials derived therefrom are not "investigative files."

The grand jury is "for all practical purposes an investigative and prosecutorial arm of the executive branch," *In re Grand Jury Proceedings*, 486 F.2d 85, 89-90 (3d Cir. 1973).

The essential nature and function of the grand jury in our federal scheme is to investigate offenses and determine whether sufficient cause exists to formally file criminal charges. *United States v. Calandra*, 414 U.S. 338, 344, 345 (1974); *United States v. Stanford*, 589 F.2d 285, 293 (7th Cir. 1978); *United States v. Zarattini*, 552 F.2d 753, 756-57 (7th Cir.) *cert. denied*, 441 U.S. 942 (1977). At least since World War II, it has been the policy of the Antitrust Division to criminally prosecute all *per se* antitrust offenses by indictment. *See Memorandum of United States*, at 14, filed May 19, 1980 (No. 80 C 0888, N.D.Ill.). *See also* Lewin, *The Conduct of Grand Jury Proceedings in Antitrust Cases*, 7 Law & Contemp. Prob. 112 (1940) ("With but few exceptions, all of the criminal prosecutions instituted under the Sherman Antitrust Act have been commenced by grand jury investigations."); ABA *Antitrust Law Developments*, 233 (1975).

Indeed, the investigative function of the grand jury is at its height in antitrust proceedings:

> In most suspected crimes outside the antitrust area, the prosecutor has already marshaled the evidence and does not expect to make any significant use of the grand jury's investigative compulsory process but rather, simply asks that they return an indictment. However, since most criminal antitrust investigations involve suspected conspiratorial conduct under Section 1 of the Sherman Act, [footnote omitted] which is, by its very nature, secretive, the Antitrust Division attorney rarely presents the grand jury with a complete case.
>
> The typical grand jury antitrust investigation is a laborious process which takes from a minimum of six months to as much as several years to complete. Accordingly, it is an expensive and time-consuming process not only to the grand jurors and the government, but also to corporations and other persons

> under investigation, and the courts . . . *The process from the inception of the investigation through the return of an indictment is somewhat involved and, in many aspects, unique to antitrust. (Emphasis added).*

Steinhouse, *Antitrust Grand Jury Procedure,* 23 Clev St. L. Rev 447 (1974).

The investigatory nature of grand jury materials is also underscored by their extensive use during and after the grand jury proceedings. Although protected by judicial supervision under Rule 6(e), the materials are commonly retained by the Department of Justice, which exercises considerable discretion as to their use. *See e.g., Illinois v. Sarbaugh,* 552 F.2d 768, 771-72 (7th Cir.), *cert. denied,* 434 U.S. 889 (1977); *United States v. United States District Court*, 238 F.2d 713, 721 (4th Cir. 1956), *cert. denied,* 352 U.S. 981 (1957); *United States v. Procter & Gamble Co.,* 180 F. Supp. 195, 202 (D.N.J. 1959). The Justice Department may: (1) disclose them to other personnel who are necessary to the investigation, Rule 6(e)(3)(A)(ii); *United States v. Stanford, supra* at 292; (2) disclose to a grand jury in the same district testimony given before an earlier grand jury, *United States v. Garcia*, 420 F.2d 309 (2d Cir. 1970); (3) make and retain copies of subpoenaed documents, *In re Petroleum Industry Investigation,* 152 F. Supp. 646, 647 (E.D.Va. 1957); and, most significantly, (4) use the transcripts and documents in subsequent civil antitrust proceedings. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 684 (1958); *United States v. General Electric Co.,* 209 F.Supp. 197, 202 (E.D.Pa. 1962);

Because the grand jury is the primary tool used by the Antitrust Division in investigating antitrust offenses, grand jury materials are virtually indistinguishable from and commingled with what remains within the investigative files of the government attorneys. Unlike federal crimes investigated by the FBI, IRS or Treasury Agents, grand jury materials form the very heart of the Antitrust Division's files.

It is inconceivable that Congress, which had been studying effective enforcement of the antitrust laws for more than two years, reviewing thousands of pages of material, and conducting hearings involving numerous witnesses, would remain ignorant of the long standing practices employed by the Justice Department to investigate and prosecute antitrust violations. Contrary to the Seventh Circuit's impression, 659 F.2d at 803, the legislative record is replete with references to the Justice Department's reliance upon the grand jury to investigate hard core antitrust violations.[4]

Not only is the distinction between grand jury and non-grand jury materials unsupported by the language of the statute, but attempting to label such materials as one or the other is impossible in practice. In the federal antitrust context, grand juries are empaneled very early in an investigation. Once the grand jury is commenced, nearly everything generated within the government attorneys' own files, including notes and memoranda, is essentially a discussion, summation, reproduction, or derivation of grand jury hearings or documents. It is absurd to conjure a definition of in-

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[4] *See e.g., Hearings Before the Subcomm. on Antitrust and Monopoly of Senate Judiciary Comm. on S. 1284* (Part 1) 94th Cong., 1st Sess. 163 (1975) (Testimony of J. Randolph Wilson) (". . . a price conspiracy . . . as we all know, is normally prosecuted by the Department of Justice criminally."); *Hearings Before the Subcomm. on Monopolies and Comm. Law of the House Judiciary Committee,* on *H.R. 12528 and H.R. 12921,* 93d Cong., 2d Sess. Ser. 43, 23 (1974) (statement of Asst. A.G. Kauper) ("The grand jury is an important investigatory tool, but its usefulness is limited to those situations in which we have reason to believe a criminal violation of the antitrust laws may have occurred."). *See also Senate Hearings, supra* at 91 (Statement of Kauper) (grand jury used in investigation of criminal violations under the Sherman Act); H.R. Rep. No. 94-1343, 94th Cong., 2d Sess. 5 (1976) (Letter of Attorney General Levi); *Hearings Before the Subcomm. on Monopolies and Comm. Law of the House Judiciary Comm. on H.R. 39,* 94th Cong., 1st Sess., 34 (1975).

vestigative files which requires the separation of such materials within a single file.

### C. The Court's Conclusion Disregards The Legislative Purpose Of Section 4F.

Section 4F is designed to provide information and assistance to a state attorney general relative to an actual or potential cause of action. However, information obtained by attorneys for the government prior to the institution of an investigatory grand jury may be contradicted or greatly expanded by testimony before the grand jury. If the files of the Antitrust Division are redacted and excised of all grand jury materials, the state attorney general may well receive an incomplete, exculpatory and erroneous view of the violation. Congress could not have intended the broad disclosure language of Section 4F(b) to exclude the most significant information, but include information likely to be misleading.

The conclusion of the Court of Appeals renders Section 4F(b) superfluous. If "any investigative files or other materials" language was not meant to include the essence of the information contained within such files or materials, then all that Congress was doing was providing state attorneys general with that information which has already been made available to them (and any private party), either voluntarily, under F.O.I.A. or by civil process. Under this construction, its passage was totally unnecessary and the statute is a dead letter. It is axiomatic, however, that statutes should not be construed to render them meaningless; nor should the courts suppose that Congress intended to enact unnecessary legislation. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1883); *Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977). As the United States emphasized in the district court:

> Were grand jury materials not encompassed by Section 4F(b), in most cases the only materials the Attorney General could provide to the states would be preliminary staff memorandum requesting authority to commence a grand jury investigation. This hardly could be the assistance Congress intended.

*Memorandum of United States* at 14, filed May 19, 1980 (No. 80 C 0888, N.D.Ill.).

The present case graphically illustrates this point. Prior to the *Climatemp-Borg-Reynolds* indictments, allegations concerning these conspiracies were heard by three grand juries in three separate districts over a three-year period. Grand jury materials were transfered from one district to another at the instance of the Justice Department and were used as the Antitrust Division deemed proper in pursuing the investigation. Yet, despite the massive size of the antitrust conspiracies at issue, and the fact that over 100 witnesses and thousands of documents were presented to the grand jury, the only materials which were received by the State pursuant to its Section 4F(b) request were 19 pages of preliminary memoranda authored long before the investigation reached its fruition in the Northern District.

This could not have been the result intended by Congress. The legislative history plainly reflects a Congressional desire "that the Federal Government cooperate fully with the State antitrust enforcers." House Report at 17.

The Seventh Circuit also mistakenly concluded that had Congress intended to change the law of grand jury disclosure, it would have directed Section 4F(b) to the district courts instead of the United States Attorney General, since the courts have exclusive authority under Rule 6(e) to order disclosure of grand jury materials. The circuit court reasoned that the grand jury is an appendage of the court and that grand jury

minutes and transcripts are records of the court, not the property of the government.

However, Section 4F(b) is directed to the United States Attorney General for a very practical reason. During the course of a federal antitrust investigation, extensive grand jury materials and work product derived from the grand jury process are physically gathered, generated, controlled and retained by attorneys for the Antitrust Division. As the State has consistently maintained, these materials may be disclosed pursuant to a court order under Rule 6(e). Indeed, Section 4F(b) so provides by reference to the language, "to the extent permitted by law." It is perfectly reasonable that Congress would direct the government attorneys to marshall and "make available" those relevant materials which they control, subject to an order of court under standards which would best carry out the intent of Congress.

Further, it is unnecessary and irrelevant to engage in a metaphysical discussion of who owns title or a property interest in grand jury materials. *Contra*, 659 F.2d at 803; *In re Grand Jury Investigation of Cuisiarts, Inc.*, 665 F.2d 24, 31 (2d Cir. 1981). The grand jury is "not relegated by the Constitution to a position within any of the three branches of government. The federal grand jury is a constitutional fixture in its own right . . ." *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.) *cert. denied*, 434 U.S. 825 (1977). *Accord, In re April 1956 Term Grand Jury*, 239 F.2d 263, 269 (7th Cir. 1956). The issue here is not who owns the grand jury materials, but whether Congress intended that Section 4F(b) include the total work product of a federal antitrust investigation.

Finally, if there could be any doubt that grand jury materials were encompassed by "investigative files," there should be no question that they are included in the expansive "or other materials" language. It is fundamental that in construing a statute, the court is obliged to give effect to every

word Congress used and that a statute should not be interpreted in a manner that renders one part of it inoperative. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Where Congress uses the disjunctive as in Section 4F(b), the terms of the statute are to be given separate meanings. *Reiter, supra.* Thus, even assuming *arguendo* that "investigative files" does not include grand jury materials, the "or other materials" language most certainly does.

The Seventh Circuit's unsound and overly restrictive interpretation of the intent of Congress has been rejected by two circuit courts and numerous district courts which have squarely addressed the question. As the Fourth Circuit held in approving Section 4F(b) disclosure to the Virginia Attorney General:

> It is unlikely in the extreme that Congress intended to exclude [grand jury] materials from the statutory definition of investigative files. We are satisfied that grand jury transcripts in the possession of the Department of Justice fall clearly within the term "investigative files and materials," as used in the statute.

*United States v. Colonial Chevrolet Corp.*, 629 F.2d 943, 947 (4th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981); *Accord, United States v. B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980); *In re Grand Jury Proceedings*, Misc. No. 1331 (N.D.Tex. 1/21/81), *appeal pending*, No. 81-1059 (5th Cir.); *United States v. Cargo Gasoline Co.*, 1980-81 Trade Cases (CCH) Par. 63, 868 (M.D. Fla. 1980), *stay denied*, (M.D.Fla. 2/11/81), No. 81-5128 (5th Cir. 1981); *United States v. Campbell Hardware, Inc.*, 1979-2 Trade Cases (CCH) Par. 62,794 (D.Mass. 1979); *United States v. B.F. Goodrich Co.*, 1978-2 Trade Cases (CCH) Par. 62,389 (N.D.Cal. 1978); *In re Montgomery County Real Estate Antitrust Litigation*, 452 F.Supp. 54 (D.Md. 1978).

These courts have given full force and effect to the language and will of Congress: to provide state attorneys general with *all* relevant information to encourage and assist them in enforcing the federal antitrust laws in partnership with the Department of Justice. The Seventh Circuit has failed to give effect to this unmistakable intent and its decision is clearly in error.

## III.

## SECTION 4F(b), READ IN CONJUNCTION WITH RULE 6(e), AUTHORIZES DISCLOSURE OF RELEVANT GRAND JURY MATERIALS TO STATE ATTORNEYS GENERAL WITHOUT A SHOWING OF PARTICULARIZED NEED

### A. The Legislative History Of Section 4F(b) Supports Disclosure To The Illinois Attorney General Under Rule 6(e).

Section 4F(b) of the Clayton Act permits disclosure of materials "to the extent permitted by law." 15 U.S.C. Sec. 15F(b). The only definitive legislative history of the language "to the extent permitted by law" is contained in a House Report of an earlier version of this disclosure provision:

> Section 4F promotes parens patriae actions as a major aspect of antitrust enforcement by encouraging Federal-State cooperation .... Whenever a State attorney general so requests, in order to evaluate the notice from the U.S. Attorney General or in order to bring a parens patriae action, Section 4F(b) requires the U.S. Attorney General to make the Justice Department's investigative files available to the State attorneys general "to the extent permitted

> by law." *This means that the files are to be made available except where specifically prohibited.* (emphasis added).

House Report at 17.[5]

The language of this Report emphasized above suggests that there are materials in the "investigative files or other materials" of the United States Attorney General that may be specifically precluded from disclosure. The disclosure of grand jury materials, however, is not specifically prohibited under Rule 6(e)(3)(C) Fed.R.Crim.P. That rule authorizes the disclosure of grand jury materials under appropriate controlled circumstances. It cannot be read as an absolute bar to disclosure. *United States v. Colonial Chevrolet Corp.* 629 F.2d at 948; *United States v. B.F. Goodrich Co.*, 619 F.2d at 800; *In re Montgomery County Real Estate Antitrust Litigation*, 452 F.Supp. 54, 62 (D.Md. 1978); *See also, Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894, 896 (7th Cir. 1973).

Here, the State's petition specifically requested disclosure pursuant to Section 4F(b) and Rule 6(e). However, in denying access to grand jury materials, the Seventh Circuit failed to construe the two provisions in a complementary fashion. Instead, the court mistakenly reasoned that the House Report failed to support disclosure of grand jury materials and that Rule 6(e) specifically barred their disclosure. The court compounded its error by relying upon remarks of Senator James Abourezk made during the final floor debate over Hart-Scott-Rodino.

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[5] The House version of Title III was passed in lieu of the Senate Bill. *See* Scher, *Emerging Issues Under The Antitrust Improvements Act of 1976*, 77 Colum L.Rev. 679, 681 n.9 (1977). The House Report is, therefore, the most reliable indicator of Congressional intent. *See American Airlines v. C.A.B.*, 365 F.2d 939, 949 (D.C.Cir. 1966).

Answering a question from the frantic Senate floor debate [6] regarding the Department of Justice's prospect of becoming a document clearinghouse, Senator Abourezk responded that:

> [Section 4F(b)] specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. Under existing law, he cannot turn over materials given in response to a grand jury demand or a civil investigative demand. Therefore, the section is limited by existing law to cases where materials were turned over voluntarily. This section is in the bill because it was requested by the members of the House conferees who had met on this.

122 Cong.Rec. 15,333 (daily ed. Sept. 7, 1976).

The Seventh Circuit interpreted this statement to mean that Congress did not intend grand jury materials to fall within Section 4F(b). 659 F.2d at 803, 805-806. The Fourth Circuit, however, correctly recognized, "All that Senator Abourezk was saying, however, was that under existing law (i.e., Rule 6(e), Fed.R.Crim.P.), the Attorney General could

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[6] *See* Scher, "Emerging Issues Under the Antitrust Improvements Act of 1976", 77 Colum.L.Rev. 679, 681 n.9 (1977). Professor Scher described the unusual parliamentary procedures that accompanied the passage of that Act as follows:

> Because of the extraordinary procedures adopted by the Act's sponsors to secure passage, resulting in the enactment — without conference — of the compromise bill that replaced three House-passed bills and an omnibus Senate-passed bill, and because of the number of separate bills and titles that were the subject of testimony, the legislative history of the Act is a patchwork of testimony, floor statements, debates, Committee Reports and 'Additional Statements' inserted after the conclusion of floor debates.

*Id.* at 682 (footnote omitted).

not *voluntarily* turn over such proceedings to the State Attorney General." *United States v. Colonial Chevrolet Corp.*, 629 F.2d at 947. In this sense, the Senator's statement "presents no impediment to authorizing disclosure in a proper case meeting the criteria stated in Rule 6(e)(3)." *Colonial Chevrolet*, 629 F.2d at 948.

Furthermore, Senator Abourezk's statement cannot be considered as reliable an indicator of Congressional intent as the House Report. Senator Abourezk himself acknowledged that the disclosure language in Hart-Scott-Rodino originated in the House, not the Senate. Similarly, the inclusion of Section 4F(b) in the final enactment was, as Senator Abourezk conceded, at the request of the House conferees. *See Colonial Chevrolet*, 629 F.2d at 948; *In re Montgomery County Real Estate*, 452 F.Supp. at 62 n.5; *Cf. Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 116 (1980); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979)(Remarks of single legislator are not controlling in analyzing legislative history).

The Seventh Circuit's confusion is grounded upon its narrow focus of Section 4F(b) as the sole basis for disclosure of grand jury materials. However, the plain intent of the language "to the extent permitted by law" in Section 4F(b) requires that that provision and Rule 6(e) be construed together. The pervasive objective of Congress throughout Hart-Scott-Rodino to invigorate federal and state antitrust enforcement also requires that the two provisions be effectuated in a harmonious manner.

### B. The Standard For Disclosure To State Attorneys General Under Rule 6(e), Pursuant To a Section 4F(b) Request, Does Not Require A Showing of Particularized Need.

Section 4F(b) expresses a clear Congressional intent and purpose to further the public interest in effective national an-

titrust enforcement by making all relevant investigative materials, including grand jury materials, available to state attorneys general. In order to accomodate the important co-existent public interest in grand jury secrecy protected by Rule 6(e), Congress also authorized in Section 4F(b) that disclosure of such relevant materials be made to the "extent permitted by law."

Rule 6(e)(2) precludes the Attorney General of the United States from disclosing matters occurring before the grand jury "except as otherwise provided for in these rules." Rule 6(e)(3)(C)(i) authorizes the Attorney General to disclose grand jury materials "when so directed by a court preliminarily to or in connection with a judicial proceeding . . . ."

Rule 6(e)(3)(C)(i) does not, however, set forth the standard for determining when disclosure should be granted. The standard for disclosure has evolved through judicial decisions which have weighed the competing interests of a petitioner's need for disclosure against the public interest in secrecy in light of the relevant circumstances. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979); *Dennis v. United States*, 384 U.S. 855 (1966); *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

In *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979), this Court most recently addressed the question of "what justification for disclosure must a *private* party show in order to overcome the presumption of grand jury secrecy. . . ." 441 U.S. at 213 (emphasis added). In that context, the Court determined that:

> . . . disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking

> disclosure. It is equally clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification.

441 U.S. at 223.

Traditionally, requests for disclosure of grand jury materials in aid of *private* antitrust litigation may be granted only upon a showing of "particularized need". However, this Court has never addressed itself to a request by a state attorney general for disclosure of grand jury materials, much less a request under Section 4F(b).

This case does not present the application of a traditional analysis under Rule 6(e). In the present case, the competing interests to be balanced are both of a public nature and character. Unlike cases involving requests by private parties to further private, narrow interests in another judicial proceeding, a request by a state attorney general under Section 4F(b) involves a competing public interest and purpose articulated by Congress in the Hart-Scott-Rodino Act.

Thus, where the petitioner is the chief law enforcement officer of a state, proceeding under the aegis of Section 4F(b), Congress "has resolved the public interests consideration in such a case and, in so doing, it [has] accordingly relieved that official of the requirement of establishing 'a particularized need' as a threshold condition to disclosure." *United States v. Colonial Chevrolet Corp.*, 629 F.2d at 950. This is the only conclusion that effectuates the purposes of Congress in passing Section 4F(b).

In *Colonial Chevrolet*, the Attorney General of Virginia petitioned for disclosure of grand jury materials generated during a federal criminal action charging price-fixing among automotive dealers and their trade association. The criminal case was concluded with pleas of *nolo contendere*. Access to grand jury materials was sought by the state attorney general

to aid him in evaluating the Section 4F(b) notice received from the United States and to assist him in determining whether to institute a *parens patriae* action under Section 4C. 15 U.S.C. Sec. 15c. The United States supported the requested disclosure. The district judge, however, denied disclosure on the ground that grand jury materials were not "investigative files" and, even if they were, the attorney general had not demonstrated a particularized need. The Fourth Circuit reversed and certiorari was denied by this Court.

The Fourth Circuit correctly identified the dominant purpose of Congress in enacting Hart-Scott-Rodino. The court held that grand jury materials were encompassed by Section 4F(b) and that state attorneys general were excused by Congress from demonstrating particularized need. The Court stated:

> [W]hat the district court overlooked was that we are not here concerned with a request for disclosure by a *private* party interested in *private litigation*, which was the situation in all the cases relied on by it. The requirements for disclosure, and particularly the showing of a "particularized need" as declared in these private cases are clearly inapplicable here. The applicant for disclosure in this case is the chief law enforcement officer of a State, who has been specifically invested, as a matter of federal public policy as formally expressed in an Act of Congress, with the capacity to maintain a *parens patriae* federal antitrust suit in aid of the small consumer and, in order to encourage and assist him in such undertaking, the Congress has specifically directed the Attorney General to furnish him (the State Attorney General), to "the full extent permitted by law," all the materials in the former's files "which are or may

> be relevant or material to the actual or potential" *parens patriae* cause of action. (*Original emphasis*).

629 F.2d at 950.[7]

Although finding that Section 4F(b) does not grant state attorneys general an absolute right to disclosure, the Fourth Circuit held that no showing of particularized need was required and "the burden of opposing disclosure in such a situation rests on those who would deny disclosure." 629 F.2d at 951.

In *B.F. Goodrich*, 619 F.2d 798 (9th Cir. 1980), the United States had instituted its own civil enforcement action to enjoin B.F. Goodrich from engaging in a vertical and horizontal conspiracy to fix retail and wholesale prices of replacement tires. A prior federal grand jury proceeding had concluded without the return of an indictment. Disclosure of all investigative files and grand jury materials was sought by the California Attorney General in aid of its actions under Sections 4 and 4C of the Clayton Act. Disclosure was also sought by 15 other state attorneys general in order to assist them in determining whether to institute antitrust actions on behalf of their citizens. The district court granted the requested disclosure, 1978-2 Trade Cases (CCH) Par. 62,389 (N.D.Cal. 1978), and B.F. Goodrich appealed.

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[7] Although the Fourth Circuit was considering a request for disclosure in aid of a possible *parens patriae* suit, and, therefore, couched its language in such terms, the *Colonial Chevrolet* holding is clearly applicable to the State's petition in this case. In its original version, H.R. 8532 limited the application of Section 4F to *parens patriae* actions under Section 4C, 15 U.S.C. Sec. 15c. Subsequent amendments expanded Section 4F to permit state attorneys general access to "investigative files or other materials" in bringing any action under either Sections 4 *or* 4C. Section 4F, as amended, clearly applies to this case. The expanded application of Section 4F is a further demonstration of the broad disclosure that Congress intended to accomplish.

The Ninth Circuit rejected the contention that grand jury materials were not within Section 4F(b) and concluded that "[the House Report] and the Act itself indicate that Congress intended to make grand jury materials available to State attorneys general except where specifically prohibited and without a showing of particularized and compelling need." 619 F.2d at 800. In the Ninth Circuit's view, "[t]he need for access to grand jury materials is greater for states than for ordinary individuals because of the important place state attorneys general occupy in Congress's scheme for antitrust enforcement." 619 F.2d at 801. Emphasizing the broad scope of Section 4F(b), the Court indicated that "[d]isclosure need not be limited to the same substantive violation alleged by the Government." *Id.* Appropriate protective provisions were also imposed.

In *In re Montgomery County Real Estate Antitrust Litigation*, 452 F.Supp. 54 (D.Md. 1978), the State of Maryland brought a civil antitrust suit under Sections 4C and 16 of the Clayton Act and a pendent state claim against real estate brokers who had conspired to fix brokerage commission rates. The state's complaint was nearly indentical to an indictment returned against the same defendants by the federal government. The federal criminal case was tried to a jury and all defendants were convicted. The United States and the State of Maryland jointly moved for an order permitting disclosure to the State of all grand jury materials in the possession of the Department of Justice.

Granting disclosure, the court found that the language of 4F(b) and the legislative history relating thereto authorized the disclosure of grand jury materials to the State:

> There is no provision specifically prohibiting the disclosure of grand jury materials to the state. Fed. R.Crim.P. 6(e) places such disclosure within the court's power. Section 4F(b) indicates that the court

> is to exercise this power and allow disclosure when the United States has in its possession materials which may be helpful to the state in its prosecution of a Clayton Act action. Disclosure, therefore, will be ordered in this case. [Footnote omitted].

452 F.Supp. at 62. *Accord, In re Grand Jury Proceedings*, Misc. No. 1331 (N.D.Tex. 1/21/81), *appeal pending*, No. 81-1059 (5th Cir.); *United States v. Cargo Gasoline Co.*, 1980-81 Trade Cases (CCH) Par. 63, 868 (M.D.Fla. 1980), *stay denied*, (M.D.Fla. 1981), No. 81-5128 (5th Cir. 2/24/81); *United States v. Campbell Hardware, Inc.*, 1979-2 Trade Cases (CCH) Par. 62,794 (D.Mass. 1979); [8] *Contra, In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24 (2d Cir. 1981).

### C. The Congressionally Directed Need For Limited Disclosure To The Illinois Attorney General Under Section 4F(b) Clearly Outweighs The Need For Continued Secrecy In This Case.

Under any analysis of when disclosure should be permitted under Rule 6(e), the courts must consider the relevant circumstances of the particular case in light of the need for continued secrecy and the countervailing need for disclosure.

Five reasons have been identified for the underlying policy of grand jury secrecy:

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[8] Although the orders in *In re Grand Jury Proceedings* and *Campbell Hardware* do not explain the basis for their holdings, the petitions in those cases were grounded on Section 4F(b) and Rule 6(e). The breadth of the disclosure ordered by those courts leaves no doubt that access was granted on similar terms as the disclosure allowed in the other cases cited above. *See also Memorandum of the United States* in *Campbell Hardware*, attached as an exhibit to the State's *Memorandum In Support Of Petition*, filed on January 31, 1980.

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect an innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

*Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 219, n.10.

Under the circumstances presented by the instant case, limited disclosure to the Illinois Attorney General pursuant to Section 4F(b) and Rule 6(e) will compromise none of these concerns.

After an indictment has been returned and the criminal proceedings initiated by the indictment have been completed, the first three policy reasons for secrecy no longer remain. *Illinois v. Sarbaugh*, 552 F.2d at 775; *United States v. Scott Paper Co.*, 254 F.Supp. 759, 761 (W.D.Mich. 1966). *Accord, In re Cement-Concrete Block*, 381 F.Supp. 1108, 1110 (N.D.Ill. 1974).

The fourth reason for grand jury secrecy has only limited vitality in this case, given the termination of the criminal proceedings and the widespread disclosure of grand jury materials during their pendency. Although the decision of this Court in *Douglas Oil* teaches that residual secrecy interests remain despite prior disclosure and the termination of the criminal proceedings, these residual interests can be ade-

quately dealt with by a protective order. *See also, Illinois v. Sarbaugh*, 552 F.2d at 775.

The fifth policy reason for grand jury secrecy, protection of those exonerated, also does not apply. The fact that certain businesses or individuals were under investigation will continue to be shielded from the public by the imposition of strict protective conditions upon disclosure to the Illinois Attorney General. Such protective provisions would eliminate the possibility of "public ridicule" to those who testified or submitted documents to the grand jury but were not indicted. *See Douglas Oil*, 441 U.S. at 219. The breadth of the statutory language of Section 4F(b) clearly encompasses the information relating to indicted, as well as unindicted, respondents to the grand jury's process. *See United States v. B.F. Goodrich Co.*, 619 F.2d at 801.

Only the "possible effect upon the functioning of future grand juries" remains as a reason for continued secrecy in this case. *Douglas Oil*, 441 U.S. at 222. The disclosure requested by the State herein will not, however, adversely affect future grand juries. No party could be more vitally interested in the effective functioning of the federal grand jury system than the Attorney General of the United States. Yet, the United States has consistently supported the State's petition herein. Such support would obviously not be forthcoming from the Government if the Attorney General believed that the requested disclosure might impair future grand jury investigations.

The cooperation of future grand jury witnesses would be no more discouraged by disclosure under protective conditions to the State for use in a civil antitrust action brought pursuant to Hart-Scott-Rodino than it would be when used by the United States in aid of its own civil antitrust actions. *See United States v.*

*Procter & Gamble Co.*, 356 U.S. at 683-84. Congress reiterated this when it enacted the 1977 amendments to Rule 6(e):

> There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation.

S.Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S. Code Cong. & Admin. News 527, 532.

Because of the foregoing circumstances, the public interest in maintaining the secrecy of the grand jury materials requested here has materially lessened. Whatever residual interests in secrecy remain can be protected by an order of limited disclosure to the state attorney general under clearly defined protective provisions. Furthermore, as this Court recognized in *Douglas Oil*, 441 U.S. at 223, as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury materials will have a lesser burden in showing justification.

Against what remains of the public interest needs for secrecy in this case is an important and compelling public interest in disclosure under Hart-Scott-Rodino.

**1. Disclosure Is Requested By A State Attorney General Who Has Been Accorded A Special Status By Congress To Enforce The Federal Antitrust Laws.**

The office of Attorney General has existed in the common law since the 14th Century. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 Am. Jour. Legal. Hist., 304, 305 (1958). State at-

torneys general have been vested under the common law, statutes and their respective state constitutions with a special responsibility and trust to protect the public interest and promote justice. *State of Florida ex rel. Shevin v. Exxon Corp., et al.*, 526 F.2d 266, 268 (5th Cir.) *cert. denied,* 429 U.S. 829 (1976).

As the chief law enforcement officer of his state, the attorney general is particularly sensitive to the policies and concerns underlying the rule of grand jury secrecy. It was because of his special status that Congress specifically and exclusively identified such an officer to receive federal investigative files and materials under Section 4F(b). As the House Report recognized:

> A State attorney general is an effective and ideal spokesman for the public in antitrust cases, because a primary duty of the State is to protect the health and welfare of its citizens. He is normally an elected and accountable and responsible public officer whose duty is to promote the public interest.

H.R. Rep. 94-499, 94th Cong., 2d Sess. 5 (1975).

Chairman Rodino summarized the significance of the participation of state attorneys general in the federal scheme of antitrust enforcement as follows:

> . . . [T]he legislation proposed and before us now rightfully will restore the primary protector of local and regional interest, State's attorneys general, to the vanguard in protecting the public interest and the national legal, economic and social policies expressed in the antitrust laws.

*Hearings Before the Subcommittee on Monopolies and Comm. Law of the House Judiciary Comm. on H.R. 38 and H.R. 2850*, 94th Cong., 1st Sess., Ser. 3, 2 (1975).

Further, Congressman Rodino stated:

> Public enforcers of the antitrust laws are the strategic forces designed by Congress to enable [the national policies expressed in the antitrust laws] to be carried out.

*Hearings Before the Subcommittee on Monopolies and Comm. Law of the House Judiciary Comm. on H.R. 12528 and H.R. 12921*, 93d Cong., 2d Sess., Ser. 43, 14 (1974).

Also, as the Ninth Circuit in *B. F. Goodrich* held, "Title III of the Hart-Scott-Rodino Antitrust Improvements Act was intended to create effective state antitrust enforcement and places the State attorneys general on a different footing than private parties seeking redress for antitrust violations." *United States v. B. F. Goodrich Co.*, 619 F. 2d at 800-801.

The preferred position of state attorneys general in obtaining grand jury materials is evident from a detailed analysis of the evolution of Section 4F(b). The antecedents of Section 4F(b) can be found in original Sections 4D of H.R. 12528 and H.R. 12921. Both of these sections provided that the Attorney General of the United States would be "obliged to advise the States of the pendency of Government antitrust damage actions which might also furnish a vehicle for recovery by the States." *Hearings Before the Subcommittee on Monopolies and Comm. Law of the House Judiciary Comm. on H.R. 12528 and H.R. 12921*, 93d Cong., 2d Sess., Ser. 43, 16 (1974). If the State Attorney General was unable to bring an action on behalf of his constituents, the United States Attorney General was obligated to bring such an action on behalf of the citizens of that state.

Although the notice concept was warmly welcomed by both federal and state attorneys general, they objected to the compulsory filing by the federal government. *See House Hearings, supra* at 25-26; 57-58; 93-94. Another ground for objection

was that notice alone was insufficient without any "statutory language which would require the Attorney General to divulge sufficient investigational and legal information concerning particular cases" referred to the states by the federal government. *House Hearings, supra* at 51-52; See also *Hearings Before The Subcomm. on Monopolies and Comm. Law of the House Judiciary Comm. on H.R. 38 and H.R. 2850*, 94th Cong., 1st Sess. Ser. 3, 43 (Falco) (1975). Similar provisions were introduced in the Senate, Section 4D of S .1284, and were accorded substantially the same reaction. *Hearings Before the Subcommittee on Antitrust and Monopoly of Senate Judiciary Comm. on S. 1284 (Part 1)*, 94th Cong., 1st Sess. 95, 110, 274-75, 278 (1975).

In response to this input, the *parens patriae* bills which were passed by the respective houses of Congress, H.R. 8532 and S. 1284, each deleted the mandatory filing provision for the United States and inserted provisons allowing increased access to the fruits of federal antitrust investigation. The House disclosure version took the form of Section 4F(b) and limited disclosure to state attorneys general.

The Senate disclosure section, Section 202(1) of S. 1284, was much broader in scope. It provided, in substance, that upon the completion of any government enforcement action and subject to judicial supervision, any civil antitrust plaintiff could obtain all grand jury materials relating to his antitrust action upon the payment of reasonable copying charges. Such access was to be granted without the showing of particularized need. *See* S. Rep. No. 94-803, 94th Cong., 2d Sees., 4, 32-35 (1976). Section 202(1) was deleted, without explanation, during the course of the extraordinary parliamentary manuevers that attended the Act's final passage. *See* 122 Cong. Rec. 28,272 ("Additional Statement" of Senator Hart) (1976).

Although Section 202, which applied to all parties, was deleted, the enactment of Section 4F(b) is consistent with the repeatedly expressed Congressional preference for state-

initiated antitrust enforcement over purely private antitrust actions. Understood in this light, the rejection of the extremely broad Senate disclosure provisions in favor of narrower disclosure of grand jury materials under Section 4F(b), confirms the view that state attorneys general are preferred advocates of national antitrust policy and, as responsible public officials, are worthy to be entrusted with grand jury materials.

Thus, the legislative history and purpose of Hart-Scott-Rodino clearly establishes the statutorily recognized role of the state attorney general adjunct to that of the Attorney General of the United States in the Congressional scheme of federal antitrust enforcement. *United States v. Colonial Chevrolet Corp.*, 629 F. 2d at 950. As such, use of grand jury materials by the state attorney general to pursue a federal antitrust action in the public interest is no different than use by the United States Attorney General for the same purpose in civil actions brought by that official.

Section 4F(b), Section 202(1) and the other pertinent portions of the legislative history discussed above also conclusively demonstrate that Congress addressed itself to the need to bolster antitrust enforcement by streamlining the access of state attorneys general to federal grand jury materials. Furthermore, these sections and the legislative history refute the view of the district court in *United States v. Cuisinarts Food Processor Litigation*, Cr. H-80-49 (D. Conn. 3/30/81), relied upon by the Seventh Circuit, 659 F.2d at 808, that there is no indication that the draftsmen of Hart-Scott-Rodino ever regarded the existing rules of discovery as a problem in antitrust enforcement, or that they intended to modify, or contravene the existing rules.

In addition, release to the Illinois Attorney General herein cannot be equated with release to the public at large or to private litigants. *See e.g., Interco, Inc. v. F.T.C.*, 478 F. Supp. 103 (D.D.C. 1979) (release of F.T.C.'s investigative files to

state attorneys general investigating possible antitrust violations held "not a release to the 'public' within the meaning of either 5 U.S.C. Section 552(a) or 15 U.S.C. Section 46(f)"; *Cf. Exxon Corp. v. F.T.C.*, 589 F.2d 582 (D.C. Cir. 1978); *cert. denied*, 441 U.S. 943 (1979) *Ashland Oil, Inc., v. F.T.C.*, 548 F.2d 977 (D.C. Cir. 1976) (release of confidential F.T.C. documents to Congressional committees held not a release to the "public").

Disclosure to the Illinois Attorney General under Section 4F(b) is but a specialized application of the long-standing principle that governmental bodies are entitled to special status in obtaining access to grand jury materials. *See In the Matter of Disclosure of Testimony Before the Grand Jury*, 580 F.2d 281 (8th Cir. 1978) (release to city of Omaha and state bar disciplinary commission); *Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894 (7th Cir. 1973) (release to public department review board); *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2nd Cir. 1960) (disclosure to Interstate Commerce Commission).

In disclosing grand jury transcripts to the Illinois Attorney General's office in the *Cement-Concrete Block* antitrust litigation, the court recognized that grand jury materials are often disclosed to governmental plaintiffs in order to expedite discovery even though this rationale may not be a sufficient basis for disclosure to private plaintiffs:

> Defendants' next objection is based upon numerous decisions which have held that grand jury materials should not be disclosed merely to expedite discovery for plaintiffs in a civil case. However, defendants' argument ignores a substantial body of precedent that has permitted access to grand jury materials in antitrust actions by *public* entities. (*Original emphasis.*)

*In re Cement-Concrete Block Chicago Area Grand Jury Proceedings*, 1974-1 Trade Cases (CCH) Par. 75, 131, p. 97,053 (N.D. Ill. 1974).

### 2. Disclosure Was Mandated By Congress To Carry Out The Clearly Defined Public Interest In Hart-Scott-Rodino.

Rather than merely confer standing, the Hart-Scott-Rodino Act represented a "full course of legislative choice and action". *Hearings Before the Subcommittee on Monopolies and Comm. Law of the House Judiciary Comm. on H.R. 12528 and H.R. 12921*, 93d Cong. 2d Sess., Ser. 43, 12 (1974). To make increased standing effective and to strengthen the antitrust enforcement of the several states, Section 4F(b) was designed to facilitate "coordination, communication and cooperation among Federal and State antitrust enforcers." (*House Hearings, supra* p. 12)

Thus, the House Report relating specifically to Section 4F(b) states:

> The benefits of increases in Federal-State cooperation and coordination in antitrust enforcement are obvious, and are achieved in H.R. 8532 without the expenditure of additional Federal funds.

H.R. Rep. 94-499, 94th Cong., 2d Sess. 17 (1975).

Throughout the hearings on Hart-Scott-Rodino, concerns were expressed for efficient allocation of antitrust resources,[9] the inadequacy of state budget and investigational resources,[10] and the need to provide information to the states to carry out legislative objectives in antitrust enforcement.[11]

Section 4F(b) embodies Congress' recognition of these problems, and seeks to overcome them to fulfill the national antitrust enforcement goals of Hart-Scott-Rodino. Thus, a state attorney general requires the fruits of its alternate enforcement agency to assess as quickly as possible the notice given under Section 4F(a); to determine in his discretion whether an action should be filed; who should be named as parties; the assessment of the quality of evidence to sustain an action for damages; whether and to what extent there has been direct injury to consumers or tax-supported agencies

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[9] *See generally* Hearings Before the Subcommittee on Antitrust and Monopoly of Senate Judiciary Comm. on S. 1284 (part 1), 94th Cong., 1st Sess. 275 (1975); Hearings Before the Subcommittee on Monopolies and Comm. Law of the House Judiciary Comm. on H.R. 12528 and H.R. 12921, 93d Cong., 2d Sess., Ser. 43, 12, 14 (1974); H.R. Rep. 94-499, 94th Cong., 2d Sess., 17 (1975).

[10] *See generally* Hearings Before the Subcommittee on Monopolies and Comm. Law of the House Judiciary Comm. on H.R. 12528 & H.R. 12921, 93d Cong., 2nd Sess., Ser. 43, 15, 96-97 (1974); Hill, The Present and Future Status of Parens Patriae Litigation From The Plaintiff's Viewpoint, 47 Antitrust L.J. 1378 (1979); Wood, Resurgence of State Antitrust Action: Priors and Public Awareness, 9 Antitrust L. & Econ. Rev. pt. 4, 41 (1977).

[11] *See generally* Hearings Before the Subcommittee on Antitrust and Monopoly of Senate Judiciary Comm. on S. 1284 (Part 1), 94th Cong., 1st Sess., 270, 275 (1975); Hearings Before the Subcommittee on Monopolies and Comm. Law of the House Judiciary Comm. on H.R. 12528 and H.R., 12921, 93d Cong., 2d Sess., Ser. 43, 1, 12, 52; H.R. Rep. 94-499, 94th Cong., 2d Sess., 5, 17 (1975).

and institutions;[12] the geographic area and market scope of the reported violation; and the need to know potential defenses and the cost-effectiveness to the public agency of pursuing an action. Section 4F(b) also provides that the materials of the federal investigation may be used to assist in prosecuting any action brought, and such materials are necessary to refresh recollection, impeach witnesses and test credibility, and to make such actions manageable for state attorneys general. The availability of these materials is designed to avoid the obvious waste of public resources and duplication of effort of co-existing antitrust enforcement agencies.

### 3. Relieving State Attorneys General Of the Initial Burden Of Showing Particularized Need Is Essential To Fulfill The Objectives Of Hart-Scott-Rodino.

Contrary to the legislative purposes expressed by Hart-Scott-Rodino, the Seventh Circuit determined that a state attorney general must nevertheless meet the traditional particularized need standard required in private requests for disclosure. However, applying a particularized need test to a Section 4F(b) request is wholly unnecessary where the reasons for secrecy can be fully protected while still fulfilling Congressional intent. The courts should not blindly apply the particularized need test without consideration of its foundation and countervailing public interests.

Furthermore, application of the particularized need test under these circumstances effectively renders Section 4F(b) meaningless. It is absurd to suggest that Congress passed

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[12] In the present case, the identity of all piping and sheet metal projects of all public agencies which were affected by the extensive bid rigging conspiracy.

Hart-Scott-Rodino to provide state attorneys general with notice of potential violations and the power, responsibility and encouragement to file actions under the federal antitrust laws, but intended to provide no valuable information whatsoever to these attorneys general to evaluate the notice or to assist in the prosecution of such actions. The language "to the extent permitted by law" leaves to the courts the function of assessing the Congressionally stated need for disclosure against special circumstances which would specifically prohibit disclosure on a case by case basis. *Colonial Chevrolet*, 629 F.2d at 951. Imposing a particularized need standard, which has its genesis in the entirely different context of private requests for grand jury materials, frustrates the Congressional purposes of Section 4F(b).

## D.

## THE EXERCISE OF JUDICIAL DISCRETION UNDER RULE 6(e) IS PRESERVED BY DISCLOSURE PURSUANT TO SECTION 4F(b)

Contrary to the statement of the Seventh Circuit, 659 F.2d at 802, the Illinois Attorney General has never asserted, directly or by implication, a right to automatic disclosure of grand jury materials. Congress left to the Courts the important task of assessing the relative public needs for secrecy and disclosure in this limited area to assure that both interests are furthered. Imposing a standard less restrictive than particularized need does not in any way lessen a court's role under Rule 6(e). As both the *B. F. Goodrich* and *Colonial Chevrolet* courts recognized, a district court exercises an essential role in weighing these interests to assure that the requirements of Section 4F(b) and Rule 6(e) are met. *See B. F. Goodrich*, 619 F.2d at 801; *Colonial Chevrolet*, 629 F.2d at 951.

In considering the peculiar circumstances of each case, a district court must:

1. determine that only those investigative files or other materials which are or may be relevant to the actual or potential cause of action under Sections 12 to 27 of Title 15, may be disclosed.

2. determine that the timing or extent of disclosure will not undermine an ongoing or potential federal grand jury proceeding or criminal enforcement action.

3. provide an opportunity for opponents of disclosure to establish a showing, under the relevant circumstances of the case, that disclosure should not be permitted and to assure that no countervailing circumstances exist which would warrant denial or delay in the production of the materials or parts thereof.

4. order such protective limitations on the use of the disclosed materials as may be appropriate under the peculiar facts of the case.

## IV.

## CONCLUSION

Petitioner, the State of Illinois, respectfully requests the Court to reverse the judgment of the Court of Appeals for the Seventh Circuit and to remand the case to the district court for further proceedings.

DATED: June 4, 1982

Respectfully submitted,

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# Brief for the United States

Office - Supreme Court, U.S.
FILED
JUN 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1114

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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STATE OF ILLINOIS, PETITIONER

*v.*

ABBOTT AND ASSOCIATES, INC., ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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## QUESTIONS PRESENTED

1. Whether grand jury transcripts and subpoenaed documents in the files of prosecutors who conducted a grand jury investigation are "investigative files or other materials" within the meaning of Section 4F(b) of the Clayton Act, 15 U.S.C. 15f(b).

2. Whether Section 4F(b) authorizes disclosure to state attorneys general of grand jury materials relating to antitrust investigations on a lesser showing than particularized and compelling need.

## PARTIES TO THE PROCEEDING*

The United States does not know the exact number or the identity of all the parties to this litigation. Because of the grand jury secrecy issues involved in this case, both the district court and the court of appeals ordered their respective dockets suppressed and permitted respondents to file their appearances under seal (Pet. App. 23a, 40a). This Court has likewise permitted the identities of certain respondents to be held in camera (J.A. 15). To the best knowledge of the United States, the following corporate and individual respondents are parties in this case:

> Abbott & Associates, Inc., Admiral Heating & Ventilating, Inc., Anderson & Litwack Co., Bellis-Hanley, Inc., Borg, Inc., Byness, Inc., Climatemp, Inc., Commonwealth Plumbing & Heating Co., C. W. Johnson, Inc., Economy Mechanical Industries, Inc., F. E. Moran, Inc., Gallaher & Speck, Gideon Engineering, Inc., Grigus, Inc., Hans Jenson & Sons, Inc., Ideal Heating, Inc., Illinois Heating &

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* United States Department of Justice employees were named as respondents in the State of Illinois' petition seeking disclosure of the grand jury materials at issue in this case (Pet. App. 26a). The United States has participated as a party throughout these proceedings.

Ventilating Co., Inland Heating & Air Conditioning Co., Mehring & Hanson Wendt, Inc., Moto Heating, Ventilating, Air Conditioning Corp., The Narowetz Co., National Heat & Power Co., Inc., Northern Plumbing & Heating Co., Northwestern Industrial Piping, Inc., Phillips, Getschow Co., Piping Systems, Inc., Reliable Sheet Metal Works, Inc., Voris, Inc., Windsor Heating Co., W. Wanzenberg & Co., Zack Co., Eugene Abbott, James Anderson, Stanley B. Bellis, James Berg, Elmer Bruksch, Victor Comforte, James Connor, Robert E. Curran, Dennis Dams, Robert Dannenberg, Harold English, Melvin Fakter, Lee E. Getschow, Gideon Goldschmidt, Charles Howard, Robert H. Jensen, Sr., Joseph S. Kearney, Sr., Joseph S. Kearney, Jr., Gerald A. Kelly, Lawrence Krueger, Robert Lawinger, Jr., Ronald Litt, Mid-City National Bank (Executor of the Estate of Harvey E. Anderson), Robert C. Moon, Owen A. Moran, Howard Salzman, Clemens E. Sharp, Edward Usher, Henry C. Wanzenberg, Richard Wise, Arthur Wyco.

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# In the Supreme Court of the United States

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STATE OF ILLINOIS, PETITIONER

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 659 F.2d 800. The opinion of the district court (Pet. App. 26a-39a) is not officially reported.

### JURISDICTION

The judgment of the court of appeals was entered on September 16, 1981 (Pet. App. 19a). A petition for a writ of certiorari was filed on December 15, 1981, and granted on March 22, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTE AND RULE INVOLVED

Section 4F of the Clayton Act, 15 U.S.C. 15f, as amended by the Hart-Scott-Rodino Antitrust Improve-

ments Act of 1976, Pub. L. No. 94-435, Section 301, 90 Stat. 1395-1396, provides:

> (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.
>
> (b) To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.

Fed. R. Crim. P. 6(e)(3)(C) provides in part:

> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding * * *.

## STATEMENT

In December 1976, the Antitrust Division of the United States Department of Justice began a grand jury investigation in the Southern District of Illinois to probe possible violations of federal criminal laws by persons in the construction trades in the state. During the course of the investigation, the grand jury subpoenaed numerous documents and heard the testimony of various witnesses. In August 1977, the investigation was transferred to and continued in the Northern District of Illinois.

On June 12, 1978, the grand jury indicted eighteen corporations, thirteen individuals, and a labor union for conspiring to rig bids on public sheet metal construction projects in metropolitan Chicago, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and the mail fraud statute, 18 U.S.C. 1341. *United States* v. *Climatemp, Inc.*, No. 78 CR 388 (N.D. Ill.). On January 31, 1979, the grand jury indicted eighteen corporations and five individuals for a bid-rigging conspiracy involving piping construction projects in the Chicago area, also in violation of Section 1 of the Sherman Act. *United States* v. *Borg, Inc.*, No. 79 CR 67 (N.D. Ill.).[1] All but eleven of the defendants in the two cases pled nolo contendere and were sentenced. Of the remaining defendants, nine stood trial and four were convicted (Pet. 5-6; Pet. App. 2a, 27a n.1).[2]

Pursuant to Section 4F(a) of the Clayton Act, 15 U.S.C. 15f(a), the Attorney General notified the Illinois Attorney General of the *Climatemp* indictment on June 26, 1978. The Illinois Attorney General's office thereafter began its own investigation of the bid-rigging activity, and on October 17, 1978, requested that all relevant information in the Antitrust Division's files be made available pursuant to Section 4F(b) of the Clayton Act, 15 U.S.C. 15f(b) (Pet. 6; Pet. App. 3a). The Antitrust Division responded on January 3, 1979, by producing copies of preliminary documents regarding the institution of the grand jury investigation, which totalled fewer than 20

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[1] In addition, three corporations and one individual were named in a misdemeanor indictment on January 31, 1979, for their participation in the piping construction conspiracy prior to December 21, 1974, when the Sherman Act was amended to make its violation a felony. *United States* v. *S.J. Reynolds Co, Inc.*, 79 CR 66 (N.D. Ill.).

[2] Indictments against two corporations were dismissed prior to trial in *Climatemp* because they went out of business.

pages. The Division informed the Illinois Attorney General's office that it was unable to supply other materials at that time—roughly 5500 pages of grand jury transcripts and thousands more pages of subpoenaed documents—because they were subject to the provisions of Fed. R. Crim. P. 6(e) and could only be disclosed pursuant to a court order (Pet. App. 3a).

In November and December 1979, the Illinois Attorney General filed two civil antitrust actions against 86 corporations and individuals, including the defendants in the federal criminal cases. The civil actions generally tracked the federal indictments, naming as additional defendants numerous persons and companies identified as unindicted co-conspirators in the criminal actions (Pet. 7; Pet. App. 3a). At the conclusion of the federal criminal prosecutions, the Illinois Attorney General petitioned the district court, pursuant to Section 4F(b) of the Clayton Act and Fed. R. Crim. P. 6(e), to permit the Attorney General to produce the grand jury transcripts and the documents subpoenaed during the grand jury investigation. The materials were then in the Antitrust Division's files, and the United States did not object to the request for disclosure (Pet. App. 3a).[3]

The district court denied Illinois' petition on the ground that grand jury records are not "investigative files or other materials" within the meaning of Section 4F(b) (Pet. App. 30a-31a).[4] The court held that Section 4F(b)

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[3] The United States did object to Illinois' request for disclosure of the government's pre-sentence memoranda. Neither the district court nor the court of appeals specifically addressed the issue of the pre-sentence memoranda, however, and that issue is not before the Court.

[4] Several private plaintiffs who had filed related civil antitrust suits asked for similar material. Their motions were denied, and they did not appeal.

applies only to those grand jury materials that originally belonged to the government and were voluntarily submitted by the government to the grand jury—not to those materials that were developed before the grand jury (Pet. App. 31a). The court also denied disclosure under Rule 6(e) on the ground that the requisite "particularized need" had not been shown (Pet. App. 35a-38a).

The State of Illinois appealed and the court of appeals affirmed, with one judge dissenting (Pet. App. 1a-18a). The court of appeals doubted that Congress intended to include grand jury materials among the "investigative files or other materials" that the Attorney General was required by Section 4F(b) to turn over to the states (Pet. App. 4a-7a). It further held that Congress, in enacting Section 4F(b), had not intended to relieve state attorneys general of the need to make a showing of particularized and compelling need in order to gain disclosure of grand jury materials (Pet. App. 7a-16a).[5] In this respect, the court acknowledged (*id.* at 4a) that its ruling was contrary to those of the Fourth and Ninth Circuits in *United States* v. *Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), cert. denied *sub nom. Certain Unindicted Individuals and Corporations* v. *United States*, 450 U.S. 913 (1981); and *United States* v. *B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980). Senior District Judge East, relying on the recent Fourth and Ninth Circuit decisions, dissented (Pet. App. 16a-18a).

## SUMMARY OF ARGUMENT

Section 4F(b) of the Clayton Act provides that "to the extent permitted by law" the United States Attorney General, upon proper request by a state attorney general,

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[5] The state did not contend that it had shown particularized and compelling need for the grand jury materials.

shall make available "any investigative files or other materials" in his custody that are relevant to a state antitrust suit. Transcripts of grand jury witnesses and documents subpoenaed by the grand jury that are contained in the investigative files of the Department of Justice are "investigative files or other materials" within the meaning of the statute. This straightforward and unremarkable construction of Section 4F(b)'s plain language is reinforced by legislative history demonstrating that both the House of Representatives and the Senate understood that the statute required disclosure of such materials "to the extent permitted by law."

Section 4F(b) not only reaches disclosure of grand jury materials, but alters the standard under which such materials may be disclosed to state attorneys general. The legislative history of the statute reveals that investigative files, including grand jury materials, are to be made available "except where specifically prohibited." H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 17 (1975). Fed. R. Crim. P. 6(e), relied upon by the court of appeals to deny disclosure of the grand jury materials in this case, does not "specifically prohibit" such disclosure, but rather authorizes it "preliminarily to or in connection with a judicial proceeding" (Fed. R. Crim. P. 6(e)(3)(C)(i)). The court of appeals erred in concluding that Section 4F(b) does not relax the burden imposed on a state attorney general in such a proceeding.

Section 4F(b) is an important part of a broad congressional scheme to give the states an expanded role in the enforcement of the nation's antitrust laws. In wide-ranging antitrust improvements legislation enacted in 1976, Congress specifically sought to stimulate state antitrust actions against cartel-type antitrust offenses, such as the bid-rigging involved here. To that end, Congress required the Attorney General to inform state attorneys

general of federal actions where there is reason to think that the states may be entitled to bring parallel actions, and to supply the states upon request with the information contained in the government's investigative files. Section 4F of the Clayton Act, 15 U.S.C. 15f. Unless the states may obtain access to antitrust grand jury materials contained in those files on a lesser showing than that applicable to private plaintiffs, however, this congressional intent will be largely thwarted. The Department of Justice's criminal antitrust investigative files are comprised heavily of grand jury material, and Congress knew this when it enacted Section 4F(b). The construction of Section 4F(b) adopted by the court below results in "little in the way of 'investigative files and other materials' " being made available to the states (Pet. App. 6a). The court erred in concluding that Congress enacted a statute that it knew would be of little or no assistance in furthering the broad goals of the 1976 legislation.

The court of appeals' rationale for restricting access to grand jury materials by state attorneys general is seriously flawed. The "compelling and particularized need" test for obtaining access to grand jury materials was developed in cases involving requests for such materials by private parties, not state law enforcement officials. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 213 (1979). Furthermore, the Court has specifically recognized that disclosure of grand jury materials requires a careful balancing of the interests served by disclosure against the interests in continued grand jury secrecy. 441 U.S. at 222-223. Congress' determination, embodied in Section 4F(b), that state antitrust actions are vital to the enforcement of the nation's antitrust laws is a weighty consideration on the "need for disclosure" side of this balance (441 U.S. at 222), and justifies a liberal rule for disclosure of grand jury materials to the states.

Once criminal proceedings are concluded, a proper accommodation of the antitrust enforcement policy represented by Section 4F(b) and the legitimate interests promoted by grand jury secrecy would permit state attorneys general to obtain grand jury materials on a showing of relevance, provided that no interest in grand jury secrecy is shown to be paramount in a particular case. Section 4F(b) should not be read so as to allow disclosure of such materials prior to the end of federal criminal proceedings, since the interests in continued grand jury secrecy are particularly strong prior to the termination of the criminal action. Once criminal proceedings are concluded, however, the concern for grand jury secrecy is markedly reduced. At this point, in the absence of a particularized showing that an interest in continued grand jury secrecy is still paramount, the congressional determination embodied in Section 4F(b) that state antitrust enforcement should be aided by federal cooperation to the full extent permitted by law is sufficient to permit disclosure of grand jury materials. In most cases, any legitimate interest in continued secrecy can thereafter be adequately protected by appropriate protective orders.

## ARGUMENT

Section 4F(b) provides that "the Attorney General of the United States shall, upon request by [a] State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant." As noted by the court below (Pet. App. 4a), the disclosure of grand jury materials under the statute initially presents two questions: whether grand jury materials are encompassed within the phrase "investigative files or other materials," and if so, whether their disclosure is nevertheless prohibited because Section 4F(b) provides for disclosure only "to the

extent permitted by law." The court of appeals erroneously resolved both of these inquiries against disclosure, and therefore pretermitted any further discussion of what balance should be struck in the circumstance of this case between the federal antitrust enforcement policy evidenced by Section 4F(b) and the federal judiciary's traditional concern for grand jury secrecy. Contrary to the conclusion of the court below, however, the clear language and legislative history of Section 4F(b) demonstrate Congress' intent to include grand jury materials within the scope of the statute, and to make their disclosure possible on a less stringent showing than is required of private litigants. This Court should therefore accommodate Section 4F(b)'s policy favoring disclosure with the legitimate concerns furthered by federal grand jury secrecy. The United States submits that once a federal criminal proceeding is concluded, state attorneys general may obtain grand jury material under Section 4F(b) on a showing of relevance, unless in particular cases an interest in preserving grand jury secrecy is shown to be paramount.

## I. GRAND JURY MATERIALS GENERATED IN A FEDERAL ANTITRUST INVESTIGATION AND FORMING PART OF THE GOVERNMENT'S FILES ARE "INVESTIGATIVE FILES OR OTHER MATERIALS" WITHIN THE MEANING OF SECTION 4F(b)

The starting point for any analysis of Section 4F(b) is "the language of the statute itself." *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 187 (1980); *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 4F(b) provides for the disclosure of "any investigative files or other materials." The plain language of the statute, therefore, certainly covers the grand jury transcripts and sub-

poenaed documents at issue in this case. They are "files" because they are part of and are contained in the Department of Justice's files. They are "investigative files" because they are part of the files developed and collected by federal prosecutors when they conducted their investigation before the grand jury. Moreover, even if they were not literally "investigative files," they would surely be "other materials."

This common-sense construction of Section 4F(b)'s plain language, furthermore, must be regarded as conclusive because, far from evidencing a "clearly expressed legislative intention to the contrary," the legislative history of the statute confirms that Congress intended the provision to reach grand jury materials. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, *supra*, 447 U.S. at 108. Senator Abourezk, floor manager of the bill, addressed the coverage of Section 4F(b) in the final Senate debate on the legislation. Senator Hruska, an opponent of the provision, had warned that the Justice Department would become "a massive document distribution center" under the statute, for states "would be entitled to demand truckloads of investigative materials * * *." 122 Cong. Rec. 29144 (1976). Senator Abourezk did not deny Senator Hruska's broad characterization of the phrase "investigative materials," but instead emphasized the provision's caution that the Attorney General need disclose only "to the extent permitted by law." Senator Abourezk explained that a state's mere demand for grand jury materials would not necessarily result in production of voluminous material because the Attorney General can "turn over materials given in response to a grand jury demand" only when authorized by a court order. 122 Cong. Rec. 29160 (1976). Thus, the Senate debate on Section 4F(b) clearly demonstrates that grand jury materials are not excluded from

Section 4F(b)'s "investigative files" provision. Instead, disclosure of grand jury materials is required "to the extent permitted by law."

The House, in which Section 4F(b) originated, shared this understanding. It was well aware that the Antitrust Division considered grand jury material to be part of its investigative files. Assistant Attorney General Kauper of the Antitrust Division, in testifying on a bill that was a precursor of the legislation that created Section 4F(b), told the House Judiciary Committee that grand jury materials were part of the Justice Department's "investigatory files." *Antitrust Parens Patriae Amendments: Hearings on H.R. 12528 and H.R. 12921 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 32 (1974).[6] Thus, when the House directed the Attorney General in Section 4F(b) to disclose his investigative files, it knew quite well that the Attorney General understood those files to include grand jury materials. See also *Antitrust Civil Process Act Amendment: Hearings on H.R. 39 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 34 (1975) (statement of Assistant Attorney General for Antitrust); Steinhouse, *Antitrust Grand Jury Procedure*, 23 Clev. St. L. Rev. 447 (1974).

The court of appeals nonetheless doubted that Congress meant "investigative files or other materials" to include grand jury materials because the Attorney General may not disclose such information without court

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[6] Although Assistant Attorney General Kauper gave his testimony in 1974, in reporting the bill in 1975 that included Section 4F(b), the House Judiciary Committee specifically referred to and relied on the 1974 hearings. H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 4-5 (1975).

permission (Pet. App. 5a). But this reasoning confuses the scope of the term "investigative files or other materials" with the conditions under which the Attorney General may disclose them. Congress spoke with sweeping inclusiveness when it extended the coverage of Section 4F(b) to all "investigative files or other materials." At the same time, however, Congress recognized that the Attorney General was not at liberty himself to disclose certain materials, such as grand jury transcripts and documents. It therefore directed him to disclose those files only "to the extent permitted by law." A court may authorize disclosure of grand jury material under Fed. R. Crim. P. 6(e) and once that occurs the Attorney General of course is permitted by law to disclose. Thus, the pivotal question, addressed in the following two subsections, is whether Section 4F(b) relaxes the standard district courts apply under Rule 6(e) when dealing with state requests for grand jury materials.

## II. SECTION 4F(b) PERMITS THE RELEASE OF GRAND JURY MATERIALS TO STATE ATTORNEYS GENERAL ON A LESS STRINGENT SHOWING THAN THAT APPLICABLE TO PRIVATE PARTIES

### A. Section 4F(b) Directs Disclosure Of Grand Jury Materials To The Extent The Law Allows

Under the terms of Section 4F(b), the Attorney General must disclose upon proper request all relevant "investigative files and other materials," including grand jury materials, "to the extent permitted by law." Section 4F(b) originated in the House of Representatives,[7] and

[7] Section 4F(b) was first included in parens patriae legislation reported and passed by the House. See H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 2 (1975); H.R. 8532, 94th Cong., 2d Sess. (received in Senate on Mar. 22, 1976). The Senate's proposed parens patriae legislation had no provision similar to Section 4F(b) specifically

the definitive House report explains that the qualifying phrase "to the extent permitted by law" means that the files "are to be made available except where specifically prohibited." H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 17 (1975).* Thus, contrary to the conclusion of the court of appeals, Section 4F(b) facilitates the disclosure of grand jury materials in this case because no rule of law specifically prohibits disclosure of such materials to state attorneys general.

In enacting Section 4F(b) Congress knew that the Attorney General could not release grand jury materials to a state attorney general on his own: Fed. R. Crim. P. 6(e) bars such unilateral disclosure. But unlike other provisions of law, such as Section 103(c)(3) of the Antitrust Civil Process Act, 15 U.S.C. (Supp. IV) 1313(c)(3), which

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providing for disclosure to state attorneys general. The threat of a Senate filibuster prevented a formal conference on the Senate and House versions of the legislation, and there is no conference report. 122 Cong. Rec. 29147 (1976). Nonetheless, supporters of the legislation from each body met together and informally worked out compromise language that the House and Senate then passed without change. This compromise left the House's Section 4F(b) untouched, except to expand it to cover any state antitrust suit, not just parens patriae suits.

*The court of appeals suggested that this report might be discounted, since it dealt with "an earlier version of Section 4F(b)" (Pet. App. 12a). The court, however, neglected to note that Section 4F(b) as enacted is virtually identical to Section 4F(b) as reported. Moreover, in the final House debate on Hart-Scott-Rodino a year later, when the legislation was in its present form, Congressman Rodino, Chairman of the House Judiciary Committee and floor manager of the legislation, indicated that the 1975 House Report was applicable to this portion of the legislation. 122 Cong. Rec. 30875 (1976). Cf. *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

flatly bans disclosure to antitrust plaintiffs,[9] Rule 6(e)'s prohibition is not absolute. Rather, it bars disclosure only conditionally, for it permits district courts to authorize disclosure "preliminarily to or in connection with a judicial proceeding * * *." Fed. R. Crim. P. 6(e)(3)(C)(i). As the court of appeals recognized (Pet. App. 9a, 12a), once a district court authorizes release the Attorney General is clearly "permitted by law" to turn over the materials.

Rule 6(e) itself does not articulate any standard to govern judicial authorization of disclosure. In cases involving private parties, however, this Court has interpreted the provision as requiring the demonstration of a compelling and particularized need for grand jury materials. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 221 (1979); *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681 (1958). But, as the Court recognized in *Petrol Stops*, this Rule 6(e) precedent deals only with "a private party seeking to obtain" grand jury materials. 441 U.S. at 221. The Court has never decided what Rule 6(e) showing a state attorney general must make, let alone what showing he must make when backed by Sec-

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[9] Section 103(c)(3) of the Antitrust Civil Process Act prohibits the government from giving plaintiffs antitrust materials provided pursuant to Civil Investigative Demands (C.I.D.'s) without the consent of the provider: there is no counterpart to Rule 6(e)'s disclosure authorization. Thus, whatever the appropriate Rule 6(e) standard in the present case, Congress has chosen to give state attorneys general easier access to grand jury materials than to C.I.D. materials. Congress could rationally make such a choice. The statutory bar of Section 103(c)(3) encourages compliance with C.I.D.'s. Moreover, C.I.D.'s are used only in civil antitrust investigations, while antitrust grand juries investigate the more serious criminal offenses, where the added deterrence of civil treble damage actions is especially justified.

tion 4F(b).[10] Moreover, the Court has explicitly recognized that disclosure of grand jury materials under Rule 6(e) involves balancing the interests served by disclosure against the interests in continued grand jury secrecy. 441 U.S. at 222-223. Section 4F(b) unmistakably expresses a congressional intent to aid state attorneys general in bringing actions against those who have committed antitrust offenses, and effectuation of that purpose requires that states have access to antitrust grand jury material on a less burdensome showing than that applicable to private plaintiffs.

### B. Congress Enacted Section 4F(b) With A Particular Desire To Facilitate State Antitrust Enforcement Against Clear And Well-Established Offenses Such As Price Fixing And Bid-Rigging

Section 4F(b) is an essential element of a broad congressional scheme to endow state attorneys general with special authority to enforce the nation's antitrust laws. Companion provisions to Section 4F(b), enacted by Congress in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, empower state attorneys general to bring parens patriae antitrust actions on behalf of consumers (Section 4C, 15 U.S.C. 15c), relax evidentiary standards for proving damages in such cases (Section 4D, 15 U.S.C. 15d), and sanction either the allocation of aggregate damages to compensate injured consumers or the payment of such damages into the state treasury as a civil penalty (Section 4E, 15 U.S.C. 15e).

Section 4F itself acknowledges the congressionally favored status of state attorneys general in initiating parens patriae and other types of antitrust enforcement

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[10] The issue of the standard applicable to state requests for grand jury materials in the absence of Section 4F(b) is not before the Court, and we express no opinion on it.

suits by directing the United States Attorney General to provide specific investigative assistance to the states. Section 4F(a) (15 U.S.C. 15f(a)) requires prompt notice to the states of federal antitrust actions where there is reason to think that a state may be entitled to bring a similar action. Section 4F(b) provides that, once notified, a state attorney general is to have specified access to the Attorney General's files.

The legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 *et seq.*, demonstrates conclusively that Congress sought to encourage state antitrust suits as a means of promoting effective antitrust enforcement. The House Judiciary Committee identified broad and vital goals for its proposed legislation granting state attorneys general extensive new powers. "The bill is intended to compensate the victims of antitrust offenses, to prevent antitrust violators from being unjustly enriched, and to deter future antitrust violations." H.R. Rep. No. 94-499, *supra*, at 3. The Senate Judiciary Committee, reporting on comparable parens patriae provisions, stated emphatically: "The Committee is of the view that a State attorney general is an effective and ideal spokesman for the public in antitrust cases." S. Rep. No. 94-803, 94th Cong., 2d Sess. 39 n.1 (1976); see also *id.* at 5-7.

It is also clear that suits against price fixing and related cartel offenses, such as bid-rigging, were meant to be the crux of the state enforcement Congress sought to stimulate. Congress' harsh view of these practices had led it only two years earlier to bolster the maximum criminal penalties under the Sherman Act by increasing the possible term of imprisonment from one to three years and the possible corporate fine from $50,000 to $1,000,000. Section 3 of the Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1708. The committee reports

on the 1976 legislation clearly reflect that Congress was openly disturbed that, notwithstanding these increases in penalty, price fixing had not abated but quite possibly had increased. [11] The committee reports on the parens patriae provisions of the 1976 legislation are filled with references to price fixing and its damage to a competitive economy. Singled out for particular condemnation are conspiracies involving food: bread and bakery products, milk and dairy products, soft drinks, snack foods, and sugar. H.R. Rep. No. 94-499, *supra*, at 4-5; S. Rep. No. 94-803, *supra*, at 39. The reports also reference price fixing cases involving antibiotic drugs, asphalt, contract hardware, and concrete blocks. S. Rep. No. 94-803, *supra*, at 42-43. Cartel offenses, like the bid-rigging involved in this case, were thus the special target of Congress in 1976, and Congress intended state antitrust suits—especially the parens patriae damage suits authorized by Title III of Hart-Scott-Rodino—to be an important complement to federal criminal actions against the businessmen who engaged in them. [12]

The disclosure provisions of Section 4F(b) were drafted to facilitate substantially these state antitrust enforcement suits. Both the plain languague and the legislative history of the statute evidence the clear mission of Section 4F(b). As the House Report states, Section 4F was

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[11] The Senate Report pointed with concern to Assistant Attorney General Kauper's statement that price fixing was still widespread, had produced a record number of criminal antitrust cases, and that federal judges had imposed "inappropriately mild" sentences on convicted violators. S. Rep. No. 94-803, *supra*, at 45 n.4.

[12] That state parens patriae suits were to deal principally with cartel-type antitrust offenses is underscored by the Senate's proposed legislation. The Senate would have limited state parens patriae suits to those involving *per se* offenses or patent fraud. H.R. 8532, 94th Cong., 2d Sess. § 401, at 30 (Senate—June 11, 1976).

designed to promote state antitrust actions "as a major aspect of antitrust enforcement * * *." H.R. Rep. No. 94-499, *supra*, at 17.[13] More state suits—and more effective state suits—against those who engage in price fixing and related cartel offenses is clearly the aim of the 1976 legislation generally and of Section 4F(b) in particular. The lower court's unnecessarily grudging interpretation of Section 4F(b) severely hampers this congressional intent.

### C. Unless The States May Obtain Access To Antitrust Grand Jury Materials On A Lesser Showing Than That Applicable To Private Plaintiffs, Congress' Intent Will Be Thwarted

Since at least the end of World War II, it has been the Antitrust Division's usual practice to treat cartel-type violations of the antitrust laws as criminal matters and to investigate them largely by grand jury. In this respect the Antitrust Division is unique. United States Attorneys and most divisions of the Justice Department rely heavily on the FBI and other law enforcement agencies for investigation of crimes. Generally, they proceed to the grand jury only after such investigations have been completed. Because of the complex legal and factual background of most criminal antitrust investigations, however, the Antitrust Division uses the grand jury and its compulsory process for the bulk of its criminal in-

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[13] The informal House-Senate conference (note 7, *supra*) led to a broadening of Section 4F(b) so that, as enacted, it applies to any state antitrust action, not just parens patriae suits. The House's original intent to focus state enforcement on horizontal, hard core restraints, however, remained intact. 122 Cong. Rec. 30875 (1976) (statement of Chairman Rodino). As a practical matter, the use of Section 4F(b) will necessarily be largely confined to cartel-type offenses because it is only in such cases that federal prosecutors ordinarily develop grand jury materials.

vestigations, and relies overwhelmingly on grand jury testimony and subpoenaed documents in the preparation of its prosecutions. Thus, the Division's investigative files are comprised heavily of grand jury materials, and the most important and useful portions of the files are almost exclusively grand jury materials. The present case, in which the files are filled with many thousands of pages of grand jury materials, conforms to this pattern.

Notwithstanding the importance of the grand jury to criminal antitrust investigations, the court below concluded that Section 4F(b) did not alter the showing necessary to obtain grand jury materials because there was, in the court's view, no evidence "that Congress knew there was little investigative material extrinsic to grand jury proceedings in antitrust investigations conducted by the Department of Justice" (Pet. App. 6a; footnote omitted). But, while the Antitrust Division's investigative practices were evidently unknown to the court of appeals *(ibid.)*, Congress clearly did know that grand jury materials constituted the bulk of the Division's investigative files. Assistant Attorney General Kauper, in testifying on a bill that was a direct precursor to Hart-Scott-Rodino, told the House Judiciary Committee that the Antitrust Division rarely uses the FBI in its criminal investigations. He emphasized that, because of the complexity of antitrust matters, the Division generally uses its own attorneys. *Antitrust Civil Process Act Amendment: Hearings on H.R. 39 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, supra*, at 34. Congress clearly understood that Antitrust Division lawyers did their investigatory work before a grand jury. The House Report on Hart-Scott-Rodino states that the Division uses grand juries "in criminal antitrust investigations." H.R. Rep. No. 94-1343, 94th Cong., 2d Sess. 5 (1976). Congress'

understanding of the Division's investigative practices, moreover, reflected those of the antitrust litigation community generally. See, e.g., Steinhouse, *Antitrust Grand Jury Procedure*, *supra*, at 447; Mahaffie, *Criminal Antitrust Investigation*, 41 A.B.A. Antitrust L.J. 521, 523 (1972).

As discussed earlier, Congress clearly intended Section 4F(b) to aid state attorneys general in prosecuting cartel-type antitrust violations. Congress also knew that the Antitrust Division investigates such violations primarily by grand jury. As a result, it is only reasonable to assume that Congress intended to allow courts to give state attorneys general easier access than private plaintiffs to antitrust grand jury material. Such a construction gives effect to the disclosed congressional purpose behind Section 4F(b). By contrast, the court of appeals' conclusion requires a finding that Congress enacted a statute that it knew would be of little or no assistance to its intended beneficiaries.[14] Such a reading of the statute is contrary to accepted canons of statutory construction. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 392 (1940); *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975). The result reached by the court of appeals is particularly misguided in this case, inasmuch as Section 4F(b) embodies Congress' explicit intent to enhance enforcement of the antitrust laws by significantly increasing federal-state cooperation in an area of vital national concern. *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 4 (1958); cf. *Younger* v. *Harris*, 401 U.S. 37 (1971).

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[14] The court expressly noted that its construction of Section 4F(b) resulted in "little in the way of 'investigative files and other materials' " being made available to the states (Pet. App. 6a).

### D. The Court Of Appeals' Rationale For Restricting Access To Grand Jury Materials By State Attorneys General Is Unpersuasive

The court of appeals recognized that, under its reading, Section 4F(b) does not substantially aid the states in bringing parens patriae and other types of antitrust actions (Pet. App. 6a, 15a). It nonetheless countenanced this result because it interpreted the text and the legislative history of the phrase "to the extent permitted by law" as evidencing an intent to require state attorneys general to meet the same standards as private antitrust plaintiffs (Pet. App. 9a-14a). It reasoned that since this Court has interpreted Fed. R. Crim. P. 6(e) as requiring a showing of compelling and particularized need for the release of grand jury materials to private litigants, Congress necessarily adopted that same standard for requests by state attorneys general under Section 4F(b) (Pet. App. 9a-12a). See, e.g., *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958).

The court of appeals' analysis, however, is seriously flawed. First, it wrongly assumed that this Court had settled the applicability of the compelling and particularized need standard to requests for grand jury materials by the states. As noted earlier, *Proctor & Gamble* and its progeny are all cases in which private parties, not states, sought disclosure of grand jury materials. *Douglas Oil Co.* v. *Petrol Stops Northwest*, *supra*, 441 U.S. at 213. This Court has simply never decided a case involving a state request for grand jury materials, let alone a state request buttressed by Section 4F(b). [15] The Court's prior rulings on disclosure of grand jury materials, moreover,

[15] The court of appeals argued alternatively that, even if this Court has never spoken on the issue, Seventh Circuit precedent had established by 1976 that states and private parties are to be treated alike under Rule 6(e) (Pet. App. 10a). But whatever the state of Seventh

clearly indicate that state attorneys general may well be able to obtain such material on a lesser showing than clear and compelling need. In *Douglas Oil Co.* v. *Petrol Stops Northwest*, *supra*, the Court emphasized that any disclosure of grand jury material requires a court to balance the need for disclosure against the need for continued secrecy. 441 U.S. at 222. Congress' determination that state antitrust actions are vital to the enforcement of the nation's antitrust laws and its provision of Section 4F(b) to aid the states in initiating such actions are certainly weighty considerations on the "need for disclosure" (441 U.S. at 222) side of this balance. In light of these congressional determinations, something less than compelling and particularized need is surely sufficient to tip the scale in favor of disclosure.

The court below also erred in concluding that Congress expressly intended to retain the compelling and particularized need standard where state attorneys general seek grand jury materials pursuant to Section 4F(b). The court's only evidence of this intent was the statement of Senator Abourezk that, "[u]nder existing law," a state attorney general "cannot turn over materials given in response to a grand jury demand or to a civil investigative demand." 122 Cong. Rec. 29160 (1976). But, contrary to the conclusion of the court below, the "existing law" to which Senator Abourezk refers is not the "compelling and particularized" need standard. Senator Abourezk's statement was made in rebuttal to Senator Hruska's contention that 4F(b) would authorize the Attorney General to disclose unilaterally extensive amounts of grand jury materials (see 122 Cong. Rec. 29144 (1976)). Senator

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Circuit law in 1976, there is no evidence that Congress was aware of or relied on Seventh Circuit precedent in enacting Hart-Scott-Rodino.

Abourezk correctly replied that Congress has never authorized the Attorney General to release grand jury materials without a court order. "Under existing law," however, a court may authorize disclosure, and Senator Abourezk's statement simply does not address the standard a court will employ in passing upon a state's request for disclosure under Section 4F(b). The standard that governs a court's release of grand jury materials is an entirely separate question from the Attorney General's inability to disclose such material sua sponte. Senator Abourezk's comment deals solely with the latter issue, and does not reflect in any way a congressional resolution of the former. *United States* v. *Colonial Chevrolet Corp.*, 629 F.2d. 943, 947-948 (4th Cir. 1980). [16]

Finally, the court of appeals erroneously reasoned that, although Congress meant to "enhance the role of state attorneys general in antitrust law enforcement," it did so only by the limited means of authorizing state parens patriae suits (Pet. App. 13a-15a). [17] The fact that Congress authorized state paranes patriae actions, however, in no way precludes a further congressional intent to assist the states in initiating and prosecuting those

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[16] Senator Abourezk, though floor manager of the bill, was at best a luke-warm supporter of Section 4F(b). 122 Cong. Rec. 29160 (1976). He had favored a provision in the Senate's version of the legislation that would have radically changed Fed. R. Crim. P. 6(e) by giving all antitrust plaintiffs a right of access on demand to grand jury materials. See S. Rep. No. 94-803, *supra*, at 33; H.R. 8532, 94th Cong., 2d Sess. § 202(1), 25-26 (Senate—June 11, 1976). In the informal conference of senators and representatives (see note 7, *supra*), this sweeping legislative overruling of *Proctor & Gamble* was dropped, and Section 4F(b) retained.

[17] The court simply adopted verbatim a large portion of the district court's opinion in *In re Grand Jury Investigation of Cuisinarts, Inc.*, 516 F. Supp. 1008 (D. Conn.), aff'd, 665 F.2d 24 (1981), petition for cert. pending *sub nom. State of Connecticut* v. *Cuisinarts, Inc.*, No. 81-1595.

suits by giving their attorneys general meaningful and helpful access to documents in the Attorney General's investigative files. It is a strange argument indeed to assert that, because Congress has established the parens patriae suit as a vital antitrust enforcement tool, it cannot be concluded that Congress took the necessary steps to make that tool effective. Section 4F(b) reflects Congress' judgment that states must be given full access to the Justice Department's investigative files to fulfill their role under the 1976 legislation, and that legislative judgment cannot be trivialized simply because Congress placed special importance on the concept of the parens patriae suit. Congress meant state suits against competitors who engage in naked restraints to be the very core of the states' expanded antitrust enforcement role. Section 4F(b) is vital to the states' fulfillment of that role, and without a Rule 6(e) standard for disclosure of grand jury materials to state attorneys general different from the one applicable to private plaintiffs, Section 4F(b) withers.

### III. ONCE CRIMINAL PROCEEDINGS ARE CONCLUDED STATE ATTORNEYS GENERAL MAY OBTAIN ANTITRUST GRAND JURY MATERIALS UPON A SHOWING OF RELEVANCE, PROVIDED THAT THE PARTIES RESISTING DISCLOSURE DO NOT SHOW THAT A CONTINUED INTEREST IN GRAND JURY SECRECY OUTWEIGHS THE INTEREST IN DISCLOSURE

As the preceding discussion makes clear, Section 4F(b) of Title III of the Hart-Scott-Rodino Act evidences a congressional intent to permit state attorneys general to obtain antitrust grand jury materials except where specifically prohibited by law. H.R. Rep. No. 94-499, *supra*, at 17. The Court must therefore strike an appropriate balance between the federal antitrust enforcement policy embodied in the Act, and the Court's traditional concern with the confidential operation of grand juries.

*Douglas Oil Co.* v. *Petrol Stops Northwest*, *supra*, 441 U.S. at 222-223. A proper accommodation of the Act's interest in more effective antitrust enforcement and the interests protected by Fed. R. Crim. P. 6(e) leads to a standard by which, once criminal proceedings are over, state attorneys general ordinarily may obtain antitrust grand jury materials on a showing of relevance, unless in particular cases the interests of continued grand jury secrecy are shown to be paramount.

1. There is unanimity among the lower courts that the states are not entitled to antitrust grand jury materials on demand. See, *e.g.*, *United States* v. *Colonial Chevrolet Corp.*, *supra*, 629 F.2d at 951; *United States* v. *B.F. Goodrich Co.*, 619 F.2d 798, 801 (9th Cir. 1980). Section 4F(b) directs disclosure, but qualifies that direction with the phrase "to the extent permitted by law." If Section 4F(b) were read to command the district courts, in effect, to turn over grand jury materials on request, there would be no reason to bother the courts at all. The Attorney General could turn the material over directly and speed disclosure while contributing to judicial economy. Thus, all the lower courts agree—and the states do not dispute—that the district courts' function is more than ministerial.

2. All the courts that have considered the issue also agree that, until the United States has completed its criminal proceedings, state attorneys general may not obtain materials generated in the grand jury investigation that led to those proceedings. *United States* v. *B.F. Goodrich Co.*, *supra*, 619 F.2d at 801. See also *United States* v. *Colonial Chevrolet Corp.*, *supra*, 629 F.2d at 951. The states, moreover, do not dispute this limitation. In *Douglas Oil Co.* v. *Petrol Stops Northwest*, *supra*, the Court observed that Fed. R. Crim. P. 6(e) applies with particular force to the maintenance of secrecy before criminal proceedings are completed. 441 U.S. at 222. The

Court identified five discrete interests promoted by grand jury secrecy (*id.* at 219 n.10). Of those five interests, three relate directly to preconviction proceedings.[18] Those interests are so important to effective federal criminal law enforcement and thus to federal criminal antitrust enforcement that neither this Court nor any other court has ever allowed an antitrust plaintiff, whether a private party or a state, to obtain grand jury materials before the completion of the criminal proceedings.

Such a ban is fully consistent with the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Although Title III of the Act (90 Stat. 1394 *et seq.*) is meant to increase the effectiveness of state antitrust actions, Titles I and II are aimed solely at improving the effectiveness of federal antitrust enforcement. Title I (90 Stat. 1383 *et seq.*) broadens the scope of the Antitrust Civil Process Act (15 U.S.C. 1311 *et seq.*), while Title II (90 Stat. 1390 *et seq.*) provides for pre-merger notification to the Justice Department and Federal Trade Commission. In enacting these provisions, Congress recognized that the principal enforcement responsibilities for the nation's antitrust laws fall upon the federal government. It would seriously undermine the Act if the disclosure provision of Section 4F(b) were interpreted in a manner that jeopardized the federal enforcement the Act seeks to strengthen.[19]

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[18] Those three interests are: prevention of escape by those who may be indicted; preservation of the grand jury's freedom of deliberation; and prevention of perjury by or tampering with witnesses. 441 U.S. at 219 n.10. The two post judgment interests furthered by grand jury secrecy are: encouragement of free disclosure by witnesses before future grand juries; and protection of the innocent accused. *Ibid.*

[19] There can be little doubt that disclosure during a grand jury investigation or the subsequent criminal trial—even to states and even under protective orders—would create an unreasonable risk of

3. Once criminal proceedings are over, however, the balance between the need for disclosure and the need for continued grand jury secrecy is substantially altered. At this juncture, concern for grand jury secrecy is markedly "reduced," and "as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification." *Douglas Oil Co.* v. *Petrol Stops Northwest*, *supra*, 441 U.S. at 223. After criminal proceedings end, the only interests ordinarily served by grand jury secrecy are the encouragement of free disclosure by witnesses before future grand juries and the protection of the innocent accused (*id.* at 219 n.10).

Although these interests in grand jury secrecy outweigh a general need to aid antitrust investigation in the case of private parties, Section 4F(b) represents a legislative decision that state antitrust enforcement is of particular social value and should be aided by federal cooperation and disclosure "to the extent permitted by law." If this congressional value judgment is to be given any significance, the states must be allowed to obtain grand jury materials on something less than the showing private parties must make. Because of the congressionally recognized need to facilitate state antitrust enforcement, there should be no requirement that a state attorney general show a truly particularized or compelling need for grand jury material. Moreover, because the public interest in antitrust enforcement is legitimately broad, the state's request need not be tailored beyond a showing of relevancy, because any disclosure necessarily will be "limited to that material directly pertinent to the need for

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undermining federal law enforcement. The maintenance of confidentiality, plea bargaining and case preparation would be substantially more difficult if such disclosure were permitted.

disclosure." 441 U.S. at 224. In general, therefore, a showing that the requested materials are relevant to an actual or anticipated state antitrust action should be sufficient to obtain disclosure.

Liberal disclosure of grand jury materials to state attorneys general need not infringe upon any legitimate interests that would be served by continued secrecy. Rather, these interests can be safeguarded by granting disclosure subject to carefully worded protective orders "as may be appropriate under the peculiar facts of each case."[20] *United States* v. *Colonial Chevrolet Corp.*, *supra*, 629 F.2d at 951. Such orders can prevent, in large measure, any intimidation of witnesses before future grand juries and will shelter innocent targets of grand jury investigations from adverse publicity or other collateral consequences. It would of course remain within the district court's discretion to deny disclosure if, under the special circumstances of a particular case, the protection of a legitimate interest in grand jury secrecy is shown to require more than a protective order.[21]

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[20] In *United States* v. *B.F. Goodrich Co.*, *supra*, 619 F.2d at 801, protective orders limited disclosure of grand jury materials to the state attorneys general and designated members of their staffs, and only one copy of the material was given to each attorney general, who was then responsible for its custody. Public disclosure of the names and testimony of grand jury witnesses was prohibited until the need for it arose at trial, and names and testimony could be disclosed during discovery only if they were subject to a protective order or stipulation ensuring their confidentiality. Finally, use of the material was limited to actions brought by the State of California.

[21] Particular circumstances may warrant continued secrecy even after federal enforcement proceedings have ended. For example, continued secrecy may be necessary to protect informers who appeared before the grand jury, whether or not the grand jury handed down an indictment.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded to the district court for further proceedings under the appropriate legal standard.

Respectfully submitted.

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JUNE 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 375348 1001

# Respondent's Brief

# 1

No. 81-1114

Office-Supreme Court, U.S.
FILED
AUG 16 1982
ALEXANDER L. STEVAS,
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ILLINOIS,

*Petitioner,*

v.

ABBOTT & ASSOCIATES, INC., ET AL.,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## JOINT BRIEF FOR EIGHTY-SIX RESPONDENTS

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## QUESTIONS PRESENTED

1. Whether Congress intended, in enacting Section 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b), to include federal grand jury records, as well as investigative materials of the executive branch, within the class of "investigative files and other materials" that the Attorney General of the United States must disclose to state attorneys general upon request.

2. Whether Section 4F(b) requires the wholesale turnover of federal grand jury records to state attorneys general upon request, and without the judicial determination of particularized and compelling need mandated by Fed. R. Crim. P. 6(e) and its case law, despite the fact that Section 4F(b) authorizes disclosure only "to the extent permitted by law."

## PARTIES

Respondents adopt the list of parties contained in the Brief for the United States (Br. I-II), but add the following as related parties: Respondent Bellis Hanley, Inc. is a subsidiary of Bellis-Hanley Capital Co.; Respondent Byness, Inc. is affiliated with Klefstad Co.; Respondent Economy Mechanical Industries, Inc. is a subsidiary of Jupiter Corp.; Respondent Gideon Engineering Corp. is a subsidiary of Natkin & Co., which is a subsidiary of Fischbach Corp.; and Respondent Piping Systems, Inc. is a subsidiary of Continental Mechanical Management, Inc. which is a subsidiary of Monico, Inc. All other respondents listed on the front and inside front covers of this Joint Brief have represented that they have no parent companies, subsidiaries (except wholly owned subsidiaries), or affiliates.

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# In the Supreme Court of the United States

OCTOBER TERM, 1981

## No. 81-1114

**STATE OF ILLINOIS,**

*Petitioner,*

v.

**ABBOTT & ASSOCIATES, INC., ET AL.,**

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## JOINT BRIEF FOR EIGHTY-SIX RESPONDENTS

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 659 F.2d 800. The opinion of the district court (Pet. App. 26a-32a) is not officially reported.

### STATUTE AND RULE INVOLVED

The relevant statutory provisions and rule are set forth in Appendix A, *infra*.

### STATEMENT OF THE CASE

#### A. The Criminal and Civil Cases.

In June 1978, a federal grand jury in the Northern District of Illinois indicted 18 corporations, 13 individuals, and a labor union for alleged violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, in connection with the submission of bids on public sheet metal construction projects in the Chicago area (Pet. App. 2a). In January 1979,

the same grand jury indicted 21 corporations and six individuals for similar alleged violations in connection with piping construction projects (*ibid.*). Nine defendants were eventually tried on these indictments; four defendants were convicted and five were acquitted. The remaining defendants entered pleas of nolo contendere (*ibid.*).

While certain of the criminal cases were still ongoing, civil antitrust class actions were initiated by numerous persons, including petitioner (Pet. App. 26a-27a). Named as defendants in these class actions were the defendants in the criminal cases, other companies and individuals identified in bills of particulars in the criminal cases, and other companies and individuals neither indicted nor identified in the criminal cases (*id.* at 3a).

**B. The Requests for Grand Jury Records.**

In January 1980, before taking any discovery in the civil actions, numerous plaintiffs in those actions, including petitioner, petitioned the United States District Court for the Northern District of Illinois for leave to inspect and copy all documents relating to the criminal cases, including all presentencing reports, all documents and exhibits gathered by the grand jury, and all transcripts of testimony given before the grand jury (Pet. App. 26a-27a).[1] Each of the petitions rested upon Fed. R. Crim. P. 6(e); the State's petition rested as well upon Section 4F(b) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15f(b). *See, e.g.*, Pet. App. 27a. The petitions were consolidated before the chief judge and respondents were permitted to intervene (*id.* at 3a).

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[1] Petitioner requested only grand jury materials and presentencing memoranda (*see* J.A. 12), while other civil plaintiffs sought access to all relevant materials prepared by, or in the possession of, the Department of Justice. *See, e.g., Piping Plaintiffs' Petition for Order Permitting Release of Grand Jury Testimony and Related Materials* at 1 (filed April 10, 1980). *See also* page 42, note 44, *infra*.

**C. The Decision of the District Court.**

On January 8, 1981, after the issues had been fully briefed, the district court entered a memorandum opinion and order granting the State's petition in part, denying it in part without prejudice, and denying without prejudice the petitions filed by the other civil plaintiffs (Pet. App. 26a-39a).

The district court first considered the question whether the State was entitled to the wholesale turnover of federal grand jury materials under Section 4F(b), which requires that the Attorney General, "upon request by [a] State Attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to [an] actual or potential cause of action under section 12 to 17 of . . . title [15]" (15 U.S.C. § 15f(b)). The court concluded that Section 4F(b) "does not apply to all grand jury materials which may be found in the hands of the government attorney" (Pet. App. 28a) because the language and legislative history of this section evidence no congressional intent either: (a) to include grand jury materials within the class of executive branch files that must be made available to the states upon demand, or (b) to abrogate the fundamental and longstanding principle that grand jury materials may be disclosed only upon a judicial determination of particularized and compelling need (*id.* at 33a-35a).

On the one hand, the court reasoned that materials acquired initially by a grand jury do not become "investigatory files or other materials" of the executive branch simply because they "may by happen-chance be" in the possession of government attorneys (Pet. App. 30a). On the other hand, materials originally acquired by the executive branch do not become subject to grand jury secrecy merely because they have been shared with the

grand jury. Thus, the court concluded that Section 4F(b) "cannot be construed . . . to [require disclosure of] grand jury materials acquired by the grand jury *other than* by virtue of the investigative work of the [government] attorney and made available to the grand jury as a result of his own voluntary action" (Pet. App. 30a; emphasis added). The court therefore permitted disclosure under Section 4F(b) of only those grand jury materials that were "originally the property of the prosecutor or government investigator and voluntarily turned over by them to the grand jury" (Pet. App. 32a).[2]

With respect to the Rule 6(e) requests, the court concluded that neither petitioner nor the other civil plaintiffs had then established particularized and compelling need, and the court therefore denied the Rule 6(e) petitions without prejudice to their later renewal (Pet. App. 35a-38a).[3] Indeed, the district court anticipated that the civil plaintiffs (including petitioner) would commence discovery and then reframe their Rule 6(e) petitions in narrower terms, at which time the court would forward the grand jury materials to the district judges to whom the civil cases had been assigned (Pet. App. 38a-39a, citing

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[2] The record does not show whether petitioner has now received, or even requested, these materials.

[3] The United States incorrectly asserts (Br. 5 n.5) that petitioner did not contend in the district court that it had shown particularized need. Petitioner did in fact make that argument. *See, e.g., Supplemental Memorandum of the State of Illinois in Support of Petition to Inspect and Copy Grand Jury Materials and Presentencing Memoranda* at 7-17 (filed May 19, 1980). However, the district court rejected petitioner's argument on the facts presented, observing that "Petitioners, after having done little more than filing suit, seek an all-encompassing, unparticularized general type of full disclosure which by the very nature of the request would defeat the spirit and rule of *Procter & Gamble* and *Douglas Oil*" (Pet. App. 38a). Petitioner did not appeal from that portion of the district court's order. *See* Notice of Appeal (filed Feb. 6, 1981); Pet. Br. 6.

*Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979)). No such amended petitions were filed. Instead, petitioner immediately appealed.[4]

**D. The Decision of the Court of Appeals.**

The court of appeals affirmed by divided vote (Pet. App. 1a-18a). Because "[t]he policy in favor of grand jury secrecy is 'older than our Nation itself' " (Pet. App. 6a, quoting *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (1959)), the Seventh Circuit recognized that grand jury secrecy should be deemed abrogated only upon clear evidence of congressional intent (Pet. App. 11a, 15a-16a). The court carefully reviewed the language and legislative history of Section 4F(b), but found no evidence that Congress intended to alter the traditional requirements of Rule 6(e) and its case law (Pet. App. 11a, 15a-16a).

First, the court noted that Section 4F(b) does not specifically define "investigative files or other materials" to include grand jury records, and the legislative history contains no hint that Congress "intended [such] a general phrase . . . to include grand jury materials" (Pet. App. 7a). Second, Congress specifically restricted disclosures under Section 4F(b) to those "permitted by law" (Pet. App. 9a-11a), and it was beyond dispute when Congress enacted Section 4F(b) that grand jury records could not be disclosed absent an adjudication of particularized and compelling need. Moreover, the court found that the legislative history affirmatively shows that Congress intended to incorporate existing legal standards governing disclosure of grand jury records (Pet. App. 11a-15a). Further, although Rule 6(e) is not specifically mentioned in the legislative history of Section 4F(b), the court found that this omission clearly evidenced Con-

[4] Because the other civil plaintiffs did not appeal from the judgment of the district court, they are not petitioners in this Court. *But see* pages 48-50, *infra*.

gress's intention to preserve, rather than abrogate, existing law. As the court said, "It is simply impossible to believe that the 'indispensable secrecy of grand jury proceedings' . . . would have been altered by Congress *sub silentio*" (Pet. App. 11a; *quoting Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 399).[5]

Judge East of the District of Oregon, sitting by designation, dissented (Pet. App. 16a-18a).[6] The panel opinion was circulated to all circuit judges in regular active service, and no judge favored rehearing *en banc* (Pet. App. 21a).

## SUMMARY OF ARGUMENT

Section 4F(b) of the Clayton Act, which was enacted as part of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, provides that "the Attorney General of the United States shall, upon request by [a] State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to [an] actual or potential cause of action under sections 12 to 27 of . . . title [15]." 15 U.S.C. § 15f(b). The principal question presented in this case is whether Congress intended, in enacting this section, to abrogate the longstanding and well-

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[5] The court of appeals therefore declined (Pet. App. 4a) to follow *United States* v. *Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), and *United States* v. *B. F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980).

[6] Although Judge East would have followed the law of his circuit (*see United States* v. *B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980)), he recognized that "[i]t is arguable whether Congressional intent to open the grand jury's investigative record to a requesting . . . state is directly stated in the legislation" (Pet. App. 16a-17a). Thus, he urged Congress "to enact appropriate legislation clearly setting forth its intention in the premises" (*id.* at 18a).

settled principle embodied in Fed. R. Crim. P. 6(e) and its case law: that grand jury records must not be disclosed absent a judicial determination that the party seeking disclosure has shown at least some particularized and compelling need for the materials sought. Both courts below correctly rejected petitioner's contention that Section 4F(b) requires the turnover of grand jury records to state attorneys general without such a judicial determination.

The judgment below should be affirmed for several reasons. First, petitioner's construction of Section 4F(b) would repeal a substantial body of law. Thus, "the intention of the legislature to repeal must be clear and manifest." *Posadas* v. *National City Bank,* 296 U.S. 497, 503 (1936). However, neither the language nor the legislative history suggests that Congress intended to include grand jury records within the class of investigative materials that must be turned over upon request. Given the historic policy of grand jury secrecy, as well as the commonly understood differences between grand jury records and ordinary investigative materials, there is no basis for concluding that Congress intended to include grand jury records within the general phrase "investigative files or other materials". Indeed, Congress has carefully avoided using general language to include grand jury materials in other statutory enactments, and the legislative history affirmatively demonstrates that Congress followed this practice here.

Second, Section 4F(b) provides that the Attorney General must disclose his investigative files to state attorneys general, but only "to the extent permitted by law." This phrase manifests Congress's intention to adopt —not alter—existing law, which in 1976 clearly conditioned disclosure of grand jury records upon an adjudication of particularized and compelling need. Although

petitioner, the United States, and the amici[7] assert that this not very burdensome requirement applies only to private parties, and not state officials, the case law shows the contrary. Moreover, the legislative history, far from suggesting that Congress was aware of any such distinction and intended to adopt it, affirmatively demonstrates that Congress intended that the particularized need standard should continue to apply to requests by state attorneys general. Thus, even if Congress understood "investigative files or other materials" to include grand jury records, there is no evidence that Congress intended to grant state attorneys general any preferred position with respect to the disclosure of grand jury materials.

Third, Congress manifested the same understanding when it revisited Rule 6(e) in 1977 and 1979. In 1977, Congress enacted various amendments to enumerate those persons to whom grand jury materials could be disclosed absent an adjudication of particularized and compelling need. Congress neither included state attorneys general within this class nor otherwise manifested any understanding that it had thus altered the law of grand jury secrecy when it enacted Section 4F(b) in 1976. In 1979, Congress again amended Rule 6(e), and again emphasized the importance of preserving grand jury secrecy.

The language and legislative histories of Section 4F(b) and other related enactments thus demonstrate the correctness of the decision below. Petitioner, the United States, and the amici nonetheless ask this Court to construe Section 4F(b) to require the Attorney General to turn over grand jury records without a judicial determination of particularized need. Because their view is not supported by either the language or the legislative

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[7] A brief *amicus curiae* has been filed in support of petitioner by the attorneys general of 45 states and the corporation counsel of the District of Columbia. This brief will be referred to herein as "Amici Br."

history of Section 4F(b), they invoke alleged public policy considerations to support this drastic and dramatic change in the law. Here, as in any case involving statutory construction, however, "[t]he ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979). Petitioner's policy arguments simply misconceive the proper function of this Court in this case, which is to determine what Congress intended in 1976. Not only should these arguments be addressed to Congress, but they are inherently unpersuasive.

Petitioner suggests that Section 4F(b) is the very heart of the Hart-Scott-Rodino Act, which will be eviscerated if the Court does not endorse petitioner's views. In fact, Section 4F(b) is only a limited part of this complex statutory scheme (which was the product of intensive negotiation and compromise), and the decision below gives this section precisely the scope that Congress intended. Petitioner's argument to the contrary is premised upon the view that the general purpose of the Act—to expand the antitrust enforcement role of the states—compels the conclusion that Congress must have intended a sweeping construction for Section 4F(b). Both courts below correctly acknowledged this general purpose, but found it an inadequate proxy for evidence of any specific intent to abrogate the existing law of grand jury secrecy. As both courts below recognized, the states are clearly entitled under Section 4F(b) to receive the Attorney General's own files upon request. In addition, they may avail themselves of all previously available channels of discovery. They also may secure federal grand jury materials, as they always have, through compliance with the traditional requirements of Fed. R. Crim. P. 6(e). If Congress had also intended to alter the law of grand jury secrecy in the fundamental way suggested by petitioner, Congress surely would have said so.

## ARGUMENT

### I.

### THE RECORDS OF A FEDERAL GRAND JURY ARE NOT PART OF THE "INVESTIGATIVE FILES OR OTHER MATERIALS" OF THE ATTORNEY GENERAL UNDER SECTION 4F(b) OF THE CLAYTON ACT.

It is beyond dispute that attorneys for the federal government may not disclose matters occurring before a federal grand jury to persons outside the federal government absent a judicial determination that the party seeking disclosure has established particularized and compelling need. Fed. R. Crim. P. 6(e); *Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. 211, 222 (1979); *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400 (1959); *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 682-83 (1958). Similarly, it is beyond dispute that petitioner has made no such showing, and no court has made any such adjudication in this case.

Instead, petitioner rests its claimed entitlement to the grand jury records at issue here upon an alleged exception to this general rule, which petitioner would find in Section 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b).[8] Petitioner's reliance on Section 4F(b) is not supported by the statutory language or legislative history.

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[8] The Hart-Scott-Rodino Antitrust Improvements Act was enacted in response to specific problems encountered by small consumers in obtaining relief for alleged antitrust violations. *See* pages 38-45, *infra.* Section 4F(b) is but one limited subsection of Title III, the *parens patriae* provisions of the Act. 15 U.S.C. §§ 15f-h. Section 4F(a). 15 U.S.C. § 15f(a), requires that the Attorney General apprise state attorneys general of any pending federal antitrust action, the facts of which might also give rise to a possible civil action by the state. Section 4F(b) assures that the Attorney General will grant the requests of state attorneys general for access to possibly relevant

(footnote continued)

### A. The Plain Meaning of "Investigative Files or Other Materials" Does Not Encompass Grand Jury Records.

Petitioner apparently contends that Section 4F(b) effected a partial repeal of existing law by creating an exception to the particularized need standard of Rule 6(e) and its case law.[9] Because "repeals by implication are not favored," this Court has long held that "the intention of the legislature to repeal must be clear and manifest." *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). *Accord, TVA* v. *Hill*, 437 U.S. 153, 189 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974); *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842). Thus, petitioner must demonstrate, by clear and convincing evidence, that Congress intended to include grand jury records within the general class of materials that must be disclosed upon request under Section 4F(b).[10] On its face, however, Sec-

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(footnote continued)
investigative materials compiled by the executive branch. Although the Attorney General's stated policy prior to the enactment of Section 4F(b) had been to turn over such materials to the states, that policy was apparently followed only haphazardly. *See* pages 44-45, *infra*. Thus, the purpose of Section 4F(b) was to give that policy the force of law, to ensure both that it would be followed consistently and that it would not be changed by future Attorneys General. *See* pages 44-45, *infra*.

[9] Alternatively, petitioner contends (Br. 38) that Section 4F(b) merely codified a body of case law that previously had afforded a preferred position to state officials seeking access to grand jury materials. That case law did not exist in 1976, and it does not exist now. *See* pages 45-46, *infra*.

[10] In terms, Section 4F(b) requires the turnover "upon request" of whatever "investigative files or other materials" fall within its ambit. Petitioner, the United States, and the amici all recognize that such automatic disclosure is inconsistent with the fundamental principle of Rule 6(e) and its case law—that grand jury records
(footnote continued)

tion 4F(b) makes no mention of grand jury records; it refers only to the "investigative files or other materials" of the executive branch.

Petitioner nonetheless purports to rely upon the plain language of Section 4F(b), asserting that the language used by Congress—"investigative files or other materials"—is "intentionally broad and sweeping" (Pet. Br. 13). *See also* U.S. Br. 9-12; Amici Br. 5-7. Thus, petitioner asserts (Br. 13):

> [Section 4F(b)] mentions no specific part of the investigative files or other materials, but refers instead to "any files or other materials . . . which are or may be relevant to an actual or potential cause of action." The plain language of the statute includes grand jury materials since they are part of the files maintained

(footnote continued)
may be disclosed only in the sound discretion of the court after an adjudication of particularized and compelling need. *See* Pet. Br. 42-43; U.S. Br. 24-28, Amici Br. 12. This fundamental difference in approach shows that Congress could not have intended to include grand jury records within the general class of investigative materials to which Section 4F(b) applies. Otherwise, Congress would have provided some direction for accommodating the conflicting demands of these two provisions. The attempt of petitioner, the United States, and the amici to fill this void (Pet. Br. 42-43; U.S. 24-28; Amici Br. 12), is unpersuasive. They contend that the requirements of both provisions will be satisfied if disclosure is conditioned upon the entry of some sort of court order. That solution does not satisfy the plain language of Section 4F(b) because such disclosures would not be made "upon request." Similarly, it would not satisfy Rule 6(e) requirements because the formalistic order they contemplate would not reflect the exercise of sound discretion, but would constitute a purely ministerial act. *See* pages 47-48, *infra*. The compromise suggested by petitioner, the United States, and the amici would not only alter existing law, but it would do violence to both Rule 6(e) and Section 4F(b).

by the government during and after antitrust investigations.[11]

Petitioner's "plain language" argument does not bear scrutiny because it is premised, not upon the plain language of this section, but upon two unarticulated and unsubstantiated assumptions: (a) that Congress understood grand jury records to be indistinguishable from "investigative materials" of the executive branch, and (b) that Congress must have intended to include grand jury records within this general phrase, despite the fact that neither the text nor the legislative history of Section 4F(b) affirmatively manifests any such intention.

By asserting that the decision below rests upon "a metaphysical discussion of who owns title or a property interest in grand jury materials" (Pet. Br. 19), petitioner attempts to suggest that the differences between grand jury records and investigative materials of the executive branch are obscure and formalistic. In fact, however, the inherent differences between grand jury records and other investigative materials are not only commonly known, but grounded in a proper understanding of the unique functions of the grand jury and its historic relationship to the courts.[12]

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[11] However, the legislative history contains not a shred of evidence to show either that antitrust investigations are principally conducted through the grand jury process or that Congress believed that to be the case. Thus, Congress clearly did not act on the understanding that the government's investigative files consist principally of grand jury records. *See* pages 38-45, *infra*.

[12] The framers of the Fifth Amendment gave constitutional stature to the institution of the grand jury, which had developed in England over the course of many centuries. *See, e.g., Costello* v. *United States*, 350 U.S. 359, 361-62 (1956); *Ex parte Bain*, 121 U.S. 1, 10-11 (1887). The constitutional function of the grand jury is not only to indict those who should be tried, but also to shield the innocent against "hasty, malicious and oppressive persecution." *Wood* v. (footnote continued)

Congress was clearly aware of these differences when it employed the phrase "investigative files or other materials" and omitted mentioning grand jury records.[13]

The traditional power of the grand jury is awesome. Because the scope of its investigation has no limits, the grand jury may proceed as far as, and in whatever direction, it deems advisable. Significantly, the right to counsel and the rules of evidence are foreign to its domain. "It is a grand inquest, a body with powers of investiga-

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(footnote continued)

*Georgia*, 370 U.S. 375, 390 (1962). *See also United States* v. *Cox*, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., concurring). Although the prosecutorial function is lodged in the executive branch, the judicial branch, as part of our constitutional system of checks and balances, retains ultimate control over the grand jury's investigative function. *See United States* v. *Cosby*, 601 F.2d 754 (5th Cir. 1979); *United States* v. *Stevens*, 510 F.2d 1101, 1106 (5th Cir. 1975).

Substantial questions relating to the separation of powers would be raised if Congress actually had intended to include grand jury materials among those that the executive branch must disclose to state attorneys general upon request. *See* Maximov, *Access By State Attorneys General to Federal Grand Jury Antitrust Investigative Materials*, 69 Cal. L. Rev. 821, 831-32 (1981). The construction of Section 4F(b) adopted by the courts below is therefore further supported by the principle that legislation should be construed so as to avoid the necessity for deciding constitutional questions: "[T]he Court has [long held] that an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available." *National Labor Relations Board* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). *See also id.* at 507; *Johnson* v. *Robinson*, 415 U.S. 361, 366-67 (1974); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 356 U.S. 127, 137-38 (1961).

[13] Even absent direct evidence that Congress was aware of existing law, which is abundant here (*see* pages, 25-34, *infra*), "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-97 (1979).

tion and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v *United States,* 250 U.S. 273, 282 (1919). *See also United States* v. *Calandra,* 414 U.S. 338, 343 (1974); *United States* v. *Smyth,* 104 F.Supp. 283 (N.D. Cal. 1952). At the same time, however, the grand jury is "powerless to perform its investigative function without the court's aid because [it is] powerless itself to compel the testimony of witnesses." *Brown* v. *United States,* 359 U.S. 41, 49 (1959), *overruled on other grounds, Harris* v. *United States,* 382 U.S. 162 (1965). "It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so." *Ibid.*[14] Thus, the law of grand jury secrecy—and the special status of grand jury records—rest not simply upon the desire of the government to keep secret its case prior to trial, but upon reasons that "are manifold . . . and . . . compelling when viewed in the light of the history and *modus operandi* of the grand jury." *Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 399.

The law has long recognized that ultimate responsibility for the work product of the grand jury must rest with the courts because they must be responsible for protecting the far-reaching and possibly sensitive record that may be developed with their assis-

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[14] The district court recognized this fact when it noted (Pet. App. 33a) that grand jury transcripts are not part of the Attorney General's "investigative files" because "[i]t is the grand jury's process that makes the difference." As the district court stated (*ibid.*): "The court's subpoena is perhaps the most powerful investigative tool in the American criminal justice system. . . . Its strength can be diluted by decisions that loosely toss around the products of its process."

tance.[15] It was this principle, not some "metaphysical discussion of who owns title or a property interest in grand jury materials" (Pet. Br. 19), that caused Justice Whittaker to observe that "grand jury minutes and transcripts are not the property of the Government's attorneys, agents or investigators . . . [but] records of the court." *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 684-85 (1958) (Whittaker, J., concurring). *See also United States* v. *Penrod*, 609 F.2d 1092, 1097 (4th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). *Cf. Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 226 (1979) (the district court retains custody of the records of the grand jury following expiration of its term).[16]

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[15] Because grand jury proceedings are conducted *ex parte*, and without regard to basic evidentiary principles such as the rule against hearsay, information provided to the grand jury necessarily lacks those customary guarantees of trustworthiness associated with the adversary process. Disclosure of grand jury materials may therefore result in the dissemination of information that is misleading, ambiguous, inaccurate or untrue. Similarly, given the necessarily wide-ranging scope of grand jury questioning, the grand jury record may contain evidence that is irrelevant, privileged or scurrilous. *See, e.g., United States* v. *Scully*, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955).

[16] Significantly, neither the courts nor the Department of Justice consider grand jury materials to be "agency records" available under the Freedom of Information Act. 5 U.S.C. § 552. *See In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 31 n.10 (2d Cir. 1981), *petition for cert. pending sub nom. Connecticut* v. *Cuisinarts, Inc.*, No. 81-1595 (filed Feb. 17, 1982); Note, *Disclosure of Grand Jury Materials Under Clayton Act Section* 4F(b), 79 Mich.L.Rev. 1234, 1242 n.36 (1981).

Moreover, the Antitrust Division recognizes that (*Antitrust Division Manual* at VV-13 (Aug. 27, 1979)): "When the Division's investigative files requested by a state attorney general contain grand jury materials . . . , it is the Division's position that such disclosure is prohibited without a court order pursuant to Rule 6(e). . . . While there may be some dispute whether Section 4F(b) creates

(footnote continued)

This Court's prior decisions establish not only that grand jury records are inherently different from ordinary "investigative materials," but that this difference requires grand jury records to be kept secret unless a judicial officer determines, in the exercise of sound discretion, that the moving party has shown at least a compelling and particularized need for disclosure.[17] Although the particularized need requirement may not be burdensome in most cases, it is essential to the preservation of the grand jury system, as is the requirement that the adequacy of the particularized need showing be tested by a judicial officer. Thus, as the Court stated in *Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 398-99 (footnotes and citations omitted):

> [A]ny disclosure of grand jury minutes is covered by Fed. Rules Crim. Proc. 6(e) promulgated by this Court in 1946 after the approval of Congress. In fact, the federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it.

*Accord, Douglas Oil Co.* v. *Petrol Stops Northwest, supra,*

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(footnote continued)
an exception to the application of Rule 6(e), the Division interprets Rule 6(e) as covering grand jury materials sought by state attorneys general under Section 4F(b). This interpretation is justified and warranted by the objectives embodied in the grand jury secrecy rule and such an interpretation is in the best interests of protecting the efficacy and integrity of grand jury investigations as a law enforcement tool." *See also* J.A. 9.

[17] As this Court stated in *Douglas Oil Co.* v. *Petrol Stops Northwest, supra,* 441 U.S. at 223: "[T]he court's duty in a case of this kind is to weigh carefully the competing interests in light of the relevant circumstances and the standards announced by this Court." This uniquely judicial function could not be performed if grand jury records were included within the class of materials that must be turned over to the states upon demand.

441 U.S. at 223; *United States* v. *Procter & Gamble Co.*, *supra*, 356 U.S. at 682-83.

When Congress enacted Section 4F(b), it certainly was aware that grand jury records are records of the courts, not the executive branch, and that disclosure of grand jury records rests in the sound discretion of the courts. It is surely significant, therefore, that Section 4F(b) is addressed only to the Attorney General, who may at most have possession of grand jury records, and not to the courts, in whom the actual control of grand jury records is lawfully reposed. It is beyond dispute that the Attorney General has no legal authority to turn over grand jury records "upon request." Indeed, petitioner, the United States, and the amici all admit (Pet. Br. 42-43; U.S. Br. 24-28; Amici Br. 12) the need for some sort of court order, even on their construction of Section 4F(b), and therefore suggest that, at least where grand jury records are concerned, this Court should ignore the phrase "upon request," part of the plain language of Section 4F(b). This suggestion is without merit for several reasons. *See* page 11, note 10, *supra;* pages 22-34, 47-50, *infra*. Suffice it to note here that this suggestion violates the basic principle that a statute must be construed, where possible, to give effect to each of its provisions. *See, e.g., United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955). *Cf. Chemeheuvi Tribe of Indians* v. *Federal Power Commission*, 420 U.S. 395, 403 (1975) (the parts of a statute must be construed as a whole). Most important, this suggestion is unnecessary because the phrase "upon request" may be accorded its natural meaning so long as the phrase "investigative files or other materials" is not overburdened to include grand jury records.

The conclusion that Congress did not intend to alter the law of grand jury secrecy merely by using the phrase "investigative files or other materials" is further supported by the fact that Congress has not included grand

jury materials within such a general phrase in other legislative enactments. Indeed, Congress has regularly demonstrated its awareness of the historic distinction between grand jury records and other investigative materials by referring specifically to grand jury records when it has chosen to bring them within the ambit of particular legislation. For example, Fed. R. Crim. P. 16(a)(1) not only requires generally that the government shall turn over to a criminal defendant upon request any "written or recorded statements made by [him]," but also specifically requires the turning over of any "recorded testimony of the defendant before a grand jury. . . ." Although the latter arguably might be subsumed under the former (and certainly would be under petitioner's theory of statutory construction), Congress clearly recognized the need for dealing separately with these two categories, thus manifesting its understanding of the profound difference between ordinary investigative materials of the executive branch and grand jury records. *See also* 18 U.S.C. § 3500(e)(3) (expressly including grand jury testimony among materials that must be produced by the government in specified circumstances). Thus, if Congress had intended to alter the law of grand jury secrecy when it enacted Section 4F(b), it not only knew how to do so explicitly, but, as a matter of practice, it would have done so. *See generally*, 2A C. Sands, *Sutherland Statutory Construction* §51.02 at 291 (4th ed. 1973).

**B. The Legislative History of Section 4F(b) Shows That Congress Did Not Intend to Include Grand Jury Records Within the Class of "Investigative Files or Other Materials" to Which This Section Refers.**

The legislative history of Section 4F(b) also affirmatively demonstrates that Congress did not intend the phrase "investigative files or other materials" to include grand

jury records. The legislative history, which will be discussed in greater detail below (*see* pages 25-34, *infra*), shows that the Ninety-fourth Congress considered and rejected language that would have altered the law of grand jury secrecy. Moreover, in drafting the rejected provisions, Congress followed its customary practice of referring specifically to grand jury records. If these provisions had been enacted, civil antitrust plaintiffs and the Trade Commission would have been granted access to "any documentary material produced in and the transcripts of [any] such [relevant] grand jury proceeding." S. 1284, 94th Cong., 1st Sess. §§202 (k) and (l) (1975).[18] Although these provisions were not enacted (*see* page 28, *infra*), they show that Congress had a ready, and infinitely more appropriate, vehicle for accomplishing what petitioner contends that Congress intended to do when it enacted Section 4F(b). If Congress had indeed intended to make grand jury records available to state attorneys general upon demand, it certainly would have done so by amending the specific language of Section 202 of S. 1284, rather than by adopting the general phrase "investigative files or other materials" contained in Section 4F(b).

The conclusion that Congress was aware of the need for particularity is further supported by a chart that was introduced by Senator Abourezk, the floor leader for the bill (*see* pages 29-30, *infra*), immediately before the final Senate vote. The chart illustrates the differences among the House, Senate, and compromise versions of the bill. 122 Cong. Rec. 29148, 29149-53 (1976). Significantly, it distinguishes between grand jury records and other investigative materials, and thus deals separately with the questions: (a) whether the Attorney General's "investigative files or other materials" are to be turned over to

[18] These provisions are reprinted in Appendix B, *infra*.

state attorneys general, and (b) whether grand jury records should be disclosed absent a showing of particularized need. *Compare* Chart § III.B.7 (122 Cong. Rec. 29151 (1976)) *with* § IV.A3 (122 Cong. Rec. at 29152). By dealing separately with these two subjects, Congress clearly recognized the fundamental differences between grand jury records and other "investigative materials."[19] Finally, Senator Abourezk's chart properly notes that the Senate version (Section 202 of S. 1284) would have altered existing grand jury law, whereas the House version (which included Section 4F(b)) "has no comparable provision." 122 Cong. Rec. 29151-52 (1976).

As the court of appeals aptly concluded (Pet. App. 6a-7a), Congress could not have intended to set aside, "without a word of discussion," the special status that the law has afforded to grand jury records since the earliest days of this nation. It is clear that grand jury records are no part of the "investigative files or other materials" of the Attorney General.[20]

## II.

## THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 4F(b) SHOW THAT CONGRESS DID NOT INTEND TO ALTER THE PARTICULARIZED NEED STANDARD OF FED. R. CRIM. P. 6(e).

Even if petitioner were correct in its assertion that Congress intended to include federal grand jury records

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[19] Significantly, Senator Abourezk classified the provision for turning over "investigatory files and other materials" (Section 4F(b)) within the category of "Other issues" under the *parens patriae* provisions (122 Cong. Rec. 29151 (1976)), whereas the provision for release of grand jury materials (Section 202(1)) was appropriately classified within the category of "Major issues" under the heading of Miscellaneous Provisions (*id.* at 29152).

[20] *See In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 30-31 (2d Cir. 1981), *petition for cert. pending sub nom. Con-*

(footnote continued)

within the "investigative files or other materials" that are subject to disclosure under Section 4F(b), Congress's inclusion of the phrase "to the extent permitted by law" shows that it did not intend to abrogate the particularized need standard of Rule 6(e) and its case law.

### A. The Language of Section 4F(b) Demonstrates That Congress Intended to Retain Established Rule 6(e) Standards.

Section 4F(b) requires the Attorney General to turn over his "investigative materials" to the states, but only "to the extent permitted by law." At the time Congress enacted Section 4F(b), it was well-settled that: (a) grand jury materials could be disclosed only pursuant to court order, and (b) such an order would issue only in the exercise of sound discretion, based upon a judicial determination that the moving party had shown particularized need.[21] By including the phrase "to the extent permitted by law," Congress clearly manifested its intent to preserve, not alter, these requirements.

Essentially, petitioner, the United States, and the amici attempt to avoid the clear meaning of this phrase by asserting that the particularized need standard does not apply to state requests for federal grand jury records. Thus, the amici note (Br. 7) that "[t]he 'law' . . . applicable to disclosure of grand jury materials is Rule 6(e)," but that Rule 6(e) "does not specify a standard for determining when grand

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*necticut* v. *Cuisinarts, Inc.*, No. 81-1595 (filed Feb. 17, 1982); *Little Rock School Dist.* v. *Borden, Inc.*, 1[illegible]-2 Trade Cases (CCH) ¶ 62,809 at 78,720 (E.D. Ark. 1979); *In re Grand Jury Proceedings*, 469 F. Supp. 666, 671 (M.D. Pa. 1978).

[21] *See, e.g., Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 222 (1979); *Dennis* v. *United States*, 384 U.S. 855, 872 (1966); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959); *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958).

jury materials should be made available." The amici admit (Br. 7-8) that the courts have developed a substantial body of case law under Rule 6(e), permitting disclosure only upon a judicial determination of compelling and particularized need, but reject the relevance of that case law on the ground that it relates only to requests by private parties. According to the amici (Br. 7-10), a different standard should be applied when grand jury records are sought by state officials. Petitioner (Br. 24-26) and the United States (Br. 14-15, 21-22) make substantially the same argument.

The short answer to these arguments is that they rest on a theory of what petitioner, the United States, and the amici believe the law ought to be, rather than on Congress's understanding of what the law was in 1976. Neither petitioner, the United States, nor the amici have pointed to a single case holding that state officials' need never meet the particularized need standard,[22] and the case law affirmatively demonstrates that the courts have

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[22] The Solicitor General states (Br. 14) that "as the Court recognized in [*Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 221 (1979)], this Rule 6(e) precedent [*United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958)] deals only with 'a private party seeking to obtain' grand jury materials". The Solicitor General obviously means to suggest that the Court in *Douglas Oil* intended (albeit three years after the enactment of Section 4F(b)) to draw a legal distinction between requests by government officials and those made by private parties. As in *Procter & Gamble*, however, the party seeking disclosure in *Douglas Oil* was in fact a private party, and there was no reason for the Court to make any such distinction. Moreover, the Solicitor General's reliance on the Court's statement in *Douglas Oil* is unfaithful to the context in which that statement appears, which shows that the Court was merely describing the *facts* of *Procter & Gamble*, not laying down a legal principle.

uniformly rejected that theory.[23] Thus, Congress cannot here be charged either with knowledge of any such distinction between state officials and other parties seeking disclosure, or with concurrence therein. "[I]t is always appropriate to assume that our elected representatives, like other citizens, know the law" (*Cannon* v. *University of Chicago*, 441 U.S. 677, 696-97 (1979)), but it is far from appropriate to assume that Congress was aware of a distinction which had never been drawn in any case, and which was never mentioned during the extensive legislative proceedings that resulted in the enactment of this legislation.

The arguments of petitioner, the United States, and the amici are wide of the mark because the role of this Court in this case is to determine what Congress intended when it enacted Section 4F(b) in 1976. The answer to that question rests, not in a distinction discovered long after this section was enacted, but in Congress's understanding of the then-existing state of the law. *See Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 605, 608 (1979); *Bailey* v. *United States*, 511

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[23] *See, e.g., In re Grand Jury Matters*, No. 82-1035, slip op. at 9-10 (3d Cir. June 2, 1982); *Texas* v. *United States Steel Corp.*, 546 F.2d 626 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977); *In re Holovachka*, 317 F.2d 834, 836 (7th Cir. 1963). *Cf. In re Grand Jury Proceedings*, 309 F.2d 440, 444 (3d Cir. 1962). *See also* pages 45-46, *infra*. Indeed, petitioner argued in the district court that state attorneys general need never satisfy the particularized need standard. The district court correctly rejected this argument when it denied disclosure on the ground that petitioner had failed to show particularized need (Pet. App. 38a). Petitioner chose not to appeal that determination (*see* Notice of Appeal (filed Feb. 16, 1981); Pet. Br. 6), and the question whether state attorneys general would be entitled to grand jury materials absent compliance with the particularized need standard, and without reliance on Section 4F(b), is not now before this Court.

F.2d 540, 548 (Ct. Cl. 1975). *Cf. Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, ..... U.S. ....., 102 S.Ct. 1825, 1839-41 (1982) (Congress's perception of the state of the law at the time of enactment controls existence of implied private right of action).[24]

Congress's inclusion of the phrase "to the extent permitted by law" clearly establishes that Congress intended that state attorneys general would be required, like everyone else, to show compelling and particularized need.[25]

**B. The Legislative History of Section 4F(b) Demonstrates No Congressional Intention to Alter Existing Standards for Disclosure of Grand Jury Materials Under Rule 6(e).**

The legislative history also shows unambiguously that Congress did not intend Section 4F(b) to alter the law

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[24] The United States asserts (Br. 21) that the reasoning of the court below is "seriously flawed" because the court below "wrongly assumed that this Court had settled the applicability of the compelling and particularized need standard to requests for grand jury materials by the states," whereas "[t]his Court has simply never decided [such] a case." In fact, however, the court below, unlike the United States, properly focused its inquiry on Congress's understanding of the then-existing state of the law, and correctly concluded that the alleged distinction upon which the United States, petitioner, and the amici premise their arguments is not one that was brought to the attention of Congress in 1976.

[25] Significantly, the earliest commentators on the Act took this view, stating that Section 4F(b) requires the Attorney General to provide state attorneys general "with investigative files and other materials, except for materials obtained through grand jury proceedings or CID's, which may not be provided." Kintner, Griffin & Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 Geo. Wash. L. Rev. 1, 30 (1977) (footnotes omitted). Subsequent commentators have generally concurred in this view. *See, e.g.*, Maximov, *Access By State Attorneys General to Federal Grand Jury Antitrust Investigative Materials*, 69 Cal. L. Rev. 821 (1981); Note, *Disclosure of Grand Jury Materials Under Clayton Act Section* 4F(b), 79 Mich. L. Rev. 1234 (1981).

of grand jury secrecy. In May 1976, the Senate considered provisions that specifically would have required the turnover of grand jury materials to civil antitrust plaintiffs and the Federal Trade Commission. *See* S. 1284, 94th Cong., 1st Sess. §§202(k) and (l) (1975); Appendix B, *infra*. These proposals not only occasioned discussion of the particularized need requirement (*see* S. Rep. No. 94-803, 94th Cong. 2d Sess., Pt. I, at 31-35 (1976)), but "sparked emotional debate". Note, *Disclosure of Grand Jury Materials Under Clayton Act Section 4F(b)*, 79 Mich. L. Rev. 1234, 1253 (1981).

A minority report of the Senate Judiciary Committee noted: "Without any apparent justification, support from the Department of Justice or any other source, or consideration of the adverse impact on criminal law enforcement, section 202(k) and (l) abolish in one stroke the long-established policy for maintaining the secrecy of grand jury proceedings." S. Rep. No. 94-803, 94th Cong., 2d Sess., Pt. II, at 203 (1976). Although these provisions were supported by numerous state attorneys general (*see, e.g., Hearings on S. 1284 Before the Subcomm. on Autitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) 275-78 (remarks of Attorney General Miller of Virginia)), they were strongly opposed by the Ford Administration. *See* 122 Cong. Rec. 17038 (1976) (summary of Administration objections to S. 1284). Senator Thurmond, among others, condemned these provisions on the Senate floor because they would "arbitrarily abolish[] traditional grand jury secrecy. . . ." 122 Cong. Rec. 15318 (1976). *See also id.* at 15835 (remarks of Sen. Allen).[26]

[26] Senator Allen, an opponent of the grand jury disclosure provisions, introduced an amendment which included a section that was virtually identical to the provision of the House bill that eventually was enacted as Section 4F(b). *See* 122 Cong. Rec. 15852-53 (1976). *See also id.* at 16825, 17194. Senator Allen surely did not believe that his amendment would authorize disclosure of grand jury materials, which he opposed.

The Senate thereafter narrowed these provisions in a way that would have authorized disclosure only of corporate employees' grand jury testimony following a *nolo contendere* or guilty plea, and also eliminated any disclosure of third party documents or testimony. 122 Cong. Rec. 15917-18 (1976) (remarks of Sen. Phillip Hart); *id.* at 16922-23 (remarks of Sen. Morgan). But those who opposed disclosure of grand jury materials were not mollified. For example, Senator Tower noted: "[S]aving money on discovery is not a valid basis for exposing grand jury witness testimony to the world . . . The bill trifles lightly with a practice first instituted in 1368 when [England] . . . adopted the custom of hearing witnesses in private." *Id.* at 17428 (1976). *See also id.* at 17449 (remarks of Sen. Laxalt); *id.* at 17566 (remarks of Sen. Allen). On June 10, 1976, the Senate passed S. 1284, including Sections 202(k) and (l), as amended. 122 Cong Rec. 17572 (1976). None of the bills that had been introduced or acted upon in the House contained any analogous provision.

Whereas the various antitrust improvements proposed by the Senate were included in a single, omnibus bill (S. 1284), the House had considered a number of bills, each of which proposed particular reforms. On March 18, 1976, the House had passed H.R. 8532, 94th Cong., 2d Sess. (1976) (Title III—Antitrust *Parens Patriae* Act), and, on August 2, 1976, the House passed both H.R. 13489, 94th Cong., 2d Sess. (1976) (Title I—Antitrust Civil Process Act) and H.R. 14580, 94th Cong., 2d Sess. (1976) (Title II—Premerger Notification Act).[27] On August 24, 1976, all three House bills were consolidated as H.R. 8532. 122 Cong. Rec. 27502-03 (1976).

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[27] H.R. 13489 originally was introduced as H.R. 39, 94th Cong., 1st Sess. (1975); H.R. 14580 originally was introduced as H.R. 13131, 94th Cong., 2d Sess. (1976); and H.R. 8532 originally was introduced as H.R. 38, 94th Cong., 1st Sess. (1975).

H.R. 8532 and S. 1284 differed substantially. Although both bills contained civil investigative demand, premerger notification, and *parens patriae* provisions, S. 1284 also contained numerous miscellaneous provisions, including the grand jury disclosure sections. *See* 122 Cong. Rec. 29152 (1976). *See also* pages 19-21, *supra*. On August 24, 1976, the House requested a conference to work out a compromise bill, but a formal conference was impossible because of threats of filibuster in the Senate. Thus, Senators Kennedy, Abourezk, and Scott, the Senate sponsors, met informally with representatives of the House to develop a compromise bill that would be acceptable, without amendment, to both houses. *See* Scher, *Emerging Issues Under The Antitrust Improvements Act of 1976*, 77 Colum. L. Rev. 679, 681 n.9 (1977). This compromise bill was introduced by Senator Byrd on August 27, 1976. 122 Cong. Rec. 28251 (1976). *See also id.* at 29148-53 (1976). The compromise bill passed the Senate on September 8, 1976. *Id.* at 29345. It passed the House on September 16 (*id.* at 30888-89), and was signed into law on September 30, 1976. Among other things, the compromise bill omitted the miscellaneous provisions, which were unacceptable to the House—including the grand jury provisions—and contained only the more limited disclosure provision of Section 4F(b) of H.R. 8532. *See* 122 Cong. Rec. 29151-52 (1976).[28]

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[28] Although petitioner asserts (Br. 36) that the grand jury disclosure provisions were deleted "without explanation," the fact is that they were unacceptable to the House. Senator Abourezk, the floor manager, explained that the grand jury disclosure provisions were deleted as one of the "compromises that the sponsors have been forced to make to the House in this legislation in order to avoid a second filibuster." *Id.* at 29147. *See also id.* at 28272-73 (remarks of Sen. Phillip Hart); *id.* at 29334-35 (remarks of Sen. Kennedy). Senator Abourezk also noted that Section 4F(b) "is in the bill because it was requested by the . . . House conferees" (*id.* at 29160), a significant point inasmuch as the various House bills had never

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Perhaps the single most significant part of the legislative history is a statement made by Senator Abourezk in response to Senator Hruska's objection that Section 4F(b) could turn the Department of Justice into "a massive document distribution center for the benefit of State officials" (122 Cong. Rec. 29144 (1976)). Senator Abourezk stated (*id.* at 29160):

> [S]ection [4F(b)] specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. Under existing law, he cannot turn over materials given in response to a grand jury demand or to a civil investigative demand. Therefore, this section is limited by existing law to cases where materials were turned over voluntarily.

Senator Abourezk's statement, which confirms that Section 4F(b) was not intended to alter Rule 6(e) or its case law,[29] is singularly authoritative because it represents the considered opinion of a senator who was not only the

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included any grand jury disclosure provision. Similarly, Senator Hart and Mr. Rodino, two of the principal sponsors, discussed the major provisions of the bill at some length, but neither mentioned Section 4F(b). *See* 122 Cong. Rec. 29341-44 (1976) (remarks of Sen. Hart); *id.* at 30873-79 (remarks of Rep. Rodino). Given the fact that the subject of grand jury disclosure had been hotly debated in the Senate—and not mentioned in the House—it is inconceivable that the sponsors would not have mentioned Section 4F(b) if Congress had understood it to do what petitioner, the United States, and the amici contend.

[29] Both the court below (Pet. App. 11a) and the Second Circuit in *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 34 (1982), *petition for cert. pending sub nom. Connecticut* v. *Cuisinarts, Inc.*, No. 81-1595 (filed Feb. 17, 1982), recognized the significance of this exchange. In *United States* v. *B.F. Goodrich Co.*, 619 F.2d 798 (1980), by contrast, the Ninth Circuit did not mention it. In *United States* v. *Colonial Chevrolet Corp.*, 629 F.2d 943, 947
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floor manager, but also one of the principal architects of the compromise bill. A floor manager's exposition of a bill is always entitled to deference, and that principle applies with special force given the extraordinary parliamentary procedures involved here.[30]

The only other legislative history that bears on the issue at bar consists of a statement, contained in a House

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(4th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), the Fourth Circuit asserted, without authority, that Senator Abourezk was referring only to the necessity for securing a court order, not to the standard which must be met for such an order to issue. The United States has made the same argument here (Br. 22-23), but nothing in the legislative history supports that highly selective reading. *See, e.g.*, Maximov, *Access By State Attorneys General to Federal Grand Jury Antitrust Investigative Materials*, 69 Cal. L. Rev. 821, 829-30 (1981); Note, *Disclosure of Grand Jury Materials Under Clayton Act Section 4F(b)*, 79 Mich. L. Rev. 1234, 1253-56 (1981).

[30] *See, e.g., Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 475 (1921); *Binns* v. *United States*, 194 U.S. 486, 495 (1904); *Browder* v. *Tipton*, 630 F.2d 1149, 1151-52 (6th Cir. 1980). Further, especially given the extraordinary parliamentary procedures involved here, Senator Abourezk's statement should be considered as authoritative as if it had been made in a committee report. No formal conference occurred, and no conference committee report was prepared. As one of the principal architects of the compromise, Senator Abourezk was uniquely qualified to explain the compromise measure, and he had a special responsibility for making sure that his colleagues understood its provisions. *Cf. Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 14-16 (1976); *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Doherty* v. *United States*, 404 U.S. 28, 34 (1971) (Douglas, J., concurring) (all referring to sponsor's or committee chairman's comments on legislation); 2A C. Sands *Sutherland Statutory Construction* § 48.14, at 220 (4th ed. 1973) (statements by committee member in charge of a bill "are regarded as being in the nature of supplemental committee reports and are accorded the same weight as formal committee reports").

Report on an earlier version of the bill, that the Attorney General's "files are to be made available except where specifically prohibited." H.R. Rep. No. 94-499, 94th Cong., 2d Sess. 17 (1975). Petitioner contends (Br. 21-22) that this statement is the only "definitive" legislative evidence relevant to the issue presented here, and that it supports petitioner's theory. *See also* Amici Br. 7 n.7; U.S. Br. 13.[31] In fact, however, this statement is fully consistent with that of Senator Abourezk and also helps to make clear that state attorneys general must satisfy generally applicable standards under Rule 6(e).[32]

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[31] Even if the true meaning of this statement were that which petitioner suggests, petitioner has previously conceded (C. A. Br. at 26 (filed April 15, 1981)) that the statement is far from dispositive.

[32] Congress has recognized that Rule 6(e) provides a "clear prohibition" to the disclosure of grand jury materials. When Congress amended Rule 6(e) in 1977, the Senate Judiciary Committee stated that (S. Rep. 95-354, 95th Cong., 1st Sess. 8 (1977) (emphasis added)): "the Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a *clear prohibition*, subject to the penalty of contempt and (2) requiring that a court order under Paragraph (c) be obtained to authorize such a disclosure." *See also* 8 *Moore's Federal Practice* ¶ 6.01[6][a] (2d ed. 1980).

Although the Fourth Circuit in *United States* v. *Colonial Chevrolet Corp.*, *supra*, 629 F.2d at 948, purported to follow the language of the House Committee Report, it actually put a gloss on that language to reach a result that it thought desirable on policy grounds. The Fourth Circuit construed the House Committee's phrase "specifically prohibited" to mean "absolutely prohibited," and thus concluded that the requirements of Rule 6(e) were superseded by Section 4F(b) because the former "is not an *absolute* bar to or prohibition of disclosure of the grand jury proceedings" (629 F.2d at 948: emphasis added). Because a prohibition need not be "absolute" to be "specific," the reasoning of the Fourth Circuit is clearly erroneous. As the court said in *Little Rock School Dist.* v. *Borden, Inc.*,

(footnote continued)

In an effort to draw a distinction between those cases where disclosure of certain materials is "specifically prohibited," and the instant case, the United States (Br. 14 n.9) points to 15 U.S.C. § 1313(c)(3). That section provides that materials produced in response to a civil investigative demand (CID) may be disclosed only to the producing party, employees of the Department of Justice, and Congress.[33] But the very example chosen by the United States underscores the inconsistency of its position. It strains credulity to accept the notion that Congress would have expressly barred disclosure of CID materials in one section of the Hart-Scott-Rodino Act, and then implicitly authorized disclosure of grand jury records, which have traditionally been shielded from disclosure, in another section. Indeed, the statement of Assistant Attorney General Kauper, upon which the United States relies for a

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(footnote continued)
1979-2 Trade Cases (CCH) ¶ 62,809 at 78, 720 (E.D. Ark. 1979), "'specific prohibitions' do exist with regard to the release of grand jury testimony and there is no expression in the legislative history to counter the seemingly plain intent of the statutory language not to abrogate long standing policies with regard to grand jury secrecy." *Accord, In re Grand Jury Proceedings,* 469 F. Supp. 666, 671 (M. D. Pa. 1978). *Cf. Thomas* v. *United States,* 597 F.2d 656, 657 (8th Cir. 1979); *Librach* v. *F.B.I.,* 587 F.2d 372, 373 (8th Cir.), *cert. denied,* 440 U.S. 910 (1979); *Kanter* v. *I.R.S.,* 496 F. Supp. 1004, 1005-06 (N.D. Ill. 1980); *Murphy* v. *F.B.I.,* 490 F. Supp. 1138, 1140 (D.D.C. 1980) (all concluding that Rule 6(e) specifically exempts grand jury materials from disclosure under the Freedom of Information Act, 5 U.S.C. §552(b)(3)).

[33] The purpose of this provision was to broaden the Attorney General's investigative authority in the civil area to approximate his authority in the criminal area. *See, e.g., Proposed Amendments to the Antitrust Laws; Hearings on H.R. 12528 Before the Subcommittee on Monopolies and Commercial Law,* 93d Cong., 2d Sess. 24 (1974) (statement of Assistant Attorney General Kauper); H.R. Rep. No. 94-1343, 94th Cong., 2d Sess. 22 (1976) (statement of Attorney General Levi); *id.* at 1-2.

different purpose (Br. 11), shows that the secrecy provisions for CID's were intended to parallel those protecting grand jury materials. *Antitrust Parens Patriae Amendments: Hearings on H.R. 12528 and H.R. 1291 Before the Subcomm. on Monopolies and Commercial Law,* 93d Cong., 2d Sess. 32 (1974). *See also* 15 U.S.C. §1313(d)(1); Scher, *Emergency Issues Under the Antitrust Improvements Act of 1976,* 77 Colum. L. Rev. 679, 691-92, 692 n.80, 715 & n.213 (1977).[34]

In sum, the legislative history clearly shows that Congress adopted Section 4F(b) because Sections 202(k) and (l) of S. 1284 were unacceptable, not only to many members of the Senate, but also to the House. Sections 202(k) and (l) were hotly debated in the Senate, where many members vigorously opposed the fundamental change in grand jury secrecy law that these provisions would have entailed. The reason that Section 4F(b) gave rise to no similar controversy in the House is that no one understood Section 4F(b) to involve grand jury records. Moreover, in view of the Senate's heated debate concerning Sections 202(k) and (l), it is inconceivable that the compromise bill could have passed the Senate without protracted debate on

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[34] As the district court stated in *In re Grand Jury Investigation Of Cuisinarts, Inc.,* 516 F.Supp. 1008, 1017-19 n.13 (D.Conn.), *aff'd,* 665 F.2d 24 (2d Cir. 1981), *petition for cert. pending sub nom. State of Connecticut* v. *Cuisinarts, Inc.,* No. 81-1595 (filed Feb. 17, 1982): "Petitioners offer no principled basis for believing that grand jury materials should be treated with less of a concern for confidentiality than is required for CID's. In the relevant statutory provisions, Congress never indicates any intention of treating grand jury materials with a lower degree of confidentiality. Indeed, the fact that Congress did not establish specific guidelines for the secrecy of grand jury materials may have resulted from its belief that the preexisting Rule 6(e), Fed. R. Crim. P., had settled that issue of law sufficiently. Thus the legislative scheme which Congress created to protect CID materials from disclosure suggests how Congress intended that grand jury materials be preserved."

the question of grand jury disclosure, if the Senate had understood Section 4F(b) to mean what petitioner contends. In fact, only the Senate favored altering the law of grand jury secrecy—and the Senate receded. Thus, the state attorneys general failed in Congress to obtain the change they sought. They now seek to effect that change by inviting this Court to engage in judicial legislation and overrule Congress by construing Section 4F(b) as if it were Section 202(l). But the plain language and legislative history demonstrate that Section 4F(b) was never intended to affect Rule 6(e) or its case law.[35]

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[35] The contrary decisions of the Fourth and Ninth Circuits are erroneous. The courts in *United States* v. *B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980), and *United States* v. *Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), largely based their decisions on their perceptions of the overall policy of the Act, which, in their view, was to provide a "favored" position for state attorneys general in antitrust enforcement. *See also* U.S. Br. 15-18. Thus, arguing from the general to the particular, the *B. F. Goodrich Co.* court found cause to set aside the well-settled law of grand jury secrecy on the basis of a legislative history that it found "equivocal" at best and a congressional mandate that was, at most, "implied" (619 F.2d at 800-01). Moreover, both *B.F. Goodrich Co.* and *Colonial Chevrolet Corp.* gave inadequate consideration to the express language of Section 4F(b) and declared an exception to Rule 6(e) that is nowhere to be found in any statute. Finally, both decisions ignore the substantial body of case law that confirms the independence of the grand jury and judicial control of grand jury materials. *See, e.g., Pittsburgh Plate Glass Co.* v. *United States, supra*, 360 U.S. at 398-99. The Seventh Circuit carefully analyzed and rejected the reasoning of these contrary decisions. *See* Pet. App. 4a, 9a-14a. Following the announcement of the decision below, the Second Circuit also exhaustively considered the issues and adhered to the Seventh Circuit's reasoning. *See In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 31-35 (2d Cir. 1981) (Kaufman, J.), *petition for cert. pending sub nom. State of Connecticut* v. *Cuisinarts, Inc.*, No. 81-1595 (filed Feb. 17, 1982).

## III.

## THE RECENT AMENDMENTS TO RULE 6(e) ALSO SHOW THAT CONGRESS DID NOT INTEND TO ALTER THE LAW OF GRAND JURY SECRECY WHEN IT ENACTED SECTION 4F(b).

The 1977 and 1979 amendments to Rule 6(e), and their legislative history, also show that Congress did not intend to alter the law of grand jury secrecy when it enacted Section 4F(b).[36] Congress amended Rule 6(e) in 1977, the year following the enactment of Section 4F(b). This amendment was designed specifically to deal with the question of access to grand jury materials; it clarified and expanded the category of persons to whom grand jury materials could legally be disclosed, and reconciled the provisions of Rule 6(e) with those of other recent congressional enactments. *See* S. Rep. No. 95-354, 95th Cong., 1st Sess. 6 (1977); *In re December 1974 Grand Jury Investigation*, 449 F. Supp. 743, 745-48 (D. Md. 1978). In amending Rule 6(e), Congress redrafted this Court's proposed amendment to specify with greater particularity the persons to whom access would be permitted.[37] *See* 8

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[36] Although subsequent legislative history cannot be considered dispositive as to earlier congressional intent, it is entitled to substantial weight in circumstances such as these. *See, e.g., Zipes* v. *Trans World Airlines, Inc.*, ____ U.S. ____, 102 S.Ct. 1127, 1133 (1982); *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Cannon* v. *University of Chicago*, 441 U.S. 677, 686 n.7 (1979).

[37] Prior to 1977, Rule 6(e) permitted disclosure of grand jury materials without court order only to "attorneys for the government," but some courts had construed this provision to permit access to such materials by other federal government employees assisting an "attorney for the government." *See, e.g., United States* v. *Thomas*, 593 F.2d 615 (5th Cir.), *modified*, 604 F.2d 450 (1979); (footnote continued)

*Moore's Federal Practice* ¶ 6.05 (2d ed. 1980). This amendment therefore demonstrates not only Congress's desire for greater particularity, but also its exhaustive consideration of the question to whom disclosure should be allowed.

Significantly, the 1977 amendment nowhere refers to state attorneys general. Instead, the amendment retains the distinction between state and federal government attorneys, providing that grand jury materials may be used only for the purpose of "assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Fed. R. Crim. P. 6(e)(3)(B). Only one year after the enactment of Section 4F(b), therefore, Congress did not choose to add state at-

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(footnote continued)

*United States* v. *Stanford*, 589 F.2d 285 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979). To clarify the law in this regard, the Advisory Committee proposed an amendment (which this Court transmitted to Congress) that would have defined the phrase "attorney for the government" to include "those enumerated in Rule 54(c) . . . [as well as] such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." 425 U.S. 1161 (1976).

The House Judiciary Committee disapproved the proposed amendment and, because of its concern about disclosures to persons who were not employees of the Department of Justice, would have deferred consideration of any substantive change in Rule 6(e) until a comprehensive revision of the grand jury system could be considered. *See* H.R. Rep. No. 95-195, 95th Cong., 1st Sess. 3-5 (1977). However, the House eventually acquiesced in the Senate's desire to enact legislation in this area. *See* S. Rep. No. 95-354, 95th Cong., 1st Sess. 6-8 (1977). Thus, Congress enacted the provisions that became the present Rules 6(e)(3)(A)(ii) and 6(e)(3)(B), which affirmatively authorize disclosure to support personnel and experts whose assistance is needed by government attorneys. *See, e.g., In re Perlin*, 589 F.2d 260, 267-68 (7th Cir. 1978).

torneys general to the expanded category of persons to whom grand jury materials should be made available.[38]

Rule 6(e) was again amended in 1979, this time to provide for the recording of grand jury proceedings. Once again, those involved in the amendment process affirmed the need to retain existing legal standards relating to grand jury secrecy. As the Notes of the Advisory Committee state (Fed. R. Crim. P., Rule 6(e), 18 U.S.C.A., 1982 Pocket Part at 45): "It must be emphasized that the proposed changes in Rule 6(e) deal only with the recording requirement, and in no way expand the circumstances in which disclosure of the grand jury proceedings is permitted or required." Again, Congress neither mentioned Section 4F(b) nor suggested that its enactment of this section had affected the particularized need standard of Rule 6(e) or its case law in any way.[39]

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[38] The only reference to civil use of grand jury materials in the legislative history of this amendment also confirms the continued applicability of the particularized need standard to state grand jury requests. The Senate Report on the Rule 6(e) amendments refers to *United States* v. *Procter & Gamble*, 356 U.S. 677, 683-84 (1958), *not* Section 4F(b), when it states that access for use in civil cases should remain the same as is "the case today under prevailing court decision." S. Rep. No. 94-354, *supra*, at 8. *See also* 123 Cong. Rec. 25196 (1977) (Rep. Mann, in urging passage of the amendment, emphasized that grand "[j]ury information must not flow to the civil investigation. . . ."). This commentary demonstrates Congress's understanding that all persons who wish to make use of grand jury materials (other than persons specified in Rule 6(e)) must continue to show compelling and particularized need as set forth in *Procter & Gamble* and its progeny. *See In re Grand Jury Proceedings*, 445 F. Supp. 349, 349 (D.R.I.), *app. dismissed*, 580 F.2d 13 (1st Cir. 1978). No exception was noted for state attorneys general because no such exception exists.

[39] Petitioner also repeatedly attempts (Br. 14-16) to establish a "unique" role for grand juries in the antitrust area. However, Congress has not seen fit to endorse that view. Since 1973, Congress has considered at least 21 proposals for comprehensive revision of the grand jury system. *See* 93rd Cong., 1st Sess. (1973): H.R. 8461

(footnote continued)

## IV.

## PETITIONER'S POLICY ARGUMENTS CANNOT, AND DO NOT, OVERRIDE THE CLEAR LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 4F(b).

Given the unambiguous language and legislative history of Section 4F(b), it is not surprising that the great bulk of the briefs of petitioner, the United States, and the amici, are devoted to policy arguments designed to persuade this Court that petitioner should be granted rights to disclosure that Congress has not actually provided. These policy arguments, which should be addressed to Congress in any event, cast no doubt on the correctness of the decision below.

### A. The Decision Below Does Not Impair Antitrust Enforcement by State Attorneys General Who Retain the Spectrum of Discovery Rights That Congress Intended Them to Have.

The major thrust of petitioner's pervasive public policy argument (Br. 9-12, 17-21, 24-25, 33-42) is that the Seventh Circuit's construction of Section 4F(b) is incorrect because it will not maximize antitrust enforcement in some abstract sense. This argument is specious because the true meaning of a statutory provision must be found in its specific language and legislative history, not in some generalized sense of overall policy. *See, e.g., Consumer Products Safety Commission* v. *GTE Sylvania,*

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(footnote continued)
(Eilberg), H.R. 9008 and 9837 (Rangel); 93rd Cong., 2d Sess. (1974): H.R. 13491 and 13912 (Conyers); 94th Cong., 1st Sess. (1975): H.R. 1277 (Eilberg), H.R. 2986 and 4604 (Conyers), H.R. 6006 (Kastenmeir), H.R. 6207 (Rangel); 94th Cong., 2d Sess. (1976): S.3274 (Abourezk), H.R. 11660 (Conyers); 95th Cong., 1st Sess. (1977); S. 1449 (Abourezk), H.R. 94 and 3150 (Eilberg), H.R. 2620 (Patterson), H.R. 3736 and 5985 (Conyers), H.R. 4908 (Duncan); 95th Cong., 2d Sess. (1978): S. 3405 (Abourezk); 97th Cong., 1st Sess. (1981): S. 988 (Levin). None of these grand jury bills has suggested that antitrust cases merit special treatment or a reduced level of secrecy.

*Inc.*, 447 U.S. 102, 108 (1980). By asking this Court to construe Section 4F(b) in whatever way petitioner believes will maximize antitrust enforcement, it effectively invites this Court to do by judicial fiat what Congress has not chosen to do in the legislative process.[40] Petitioner's invitation is based not only upon an unsound view of this Court's function, but also upon a misapprehension of what Congress intended to accomplish by enacting this statute.

Petitioner would have this Court believe that the Seventh Circuit's construction of Section 4F(b) has struck a blow to the heart of the Hart-Scott-Rodino Act (Pet. Br. 11). In fact, Section 4F(b) is far from the heart of the Act, the overall purpose of which was far more specific and modest than petitioner suggests. The Act was designed to remove several specific practical obstacles to the prosecution of consumer class actions and was "a limited legislative response to [a] perceived loophole in antitrust liability." Kintner, Griffin & Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 Geo. Wash. L. Rev. 1, 19-20 (1980).

Specifically, Congress was concerned that the promise of consumer class actions had run afoul of various technical requirements of Fed. R. Civ. P. 23, particularly those relating to notice, complexity of evidentiary issues, and

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[40] Because neither the language nor the legislative history of Section 4F(b) contemplates any "preferred position" for state attorneys general, this Court's ratification of petitioner's theory would require solutions to a host of practical questions relating to the precise character and scope of that "preferred position." The articulation of such solutions is a task properly assigned to the legislative branch. For example, petitioner concedes (Br. 42-43) that grand jury materials should be released only pursuant to court order, and only after the conclusion of any federal criminal trial. Thus, petitioner recognizes that adoption of its theory would require the Court to establish some new balancing test, which clearly was not contemplated by Congress.

distribution of recoveries (*see, e.g., Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974)), and also that the federal courts had rebuffed efforts by state attorneys general (*see, e.g., California* v. *Frito-Lay, Inc.*, 474 F.2d 774, 778 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973)) to ease the practical effect of those requirements by bringing *parens patriae* actions for antitrust violations. H.R.Rep. No. 94-499, 94th Cong., 1st Sess. 5-8, 11-17 (1975).[41]

Ultimately, Congress decided to strengthen the Clayton Act by authorizing state attorneys general to bring *parens patriae* actions (§4C of the Act, 15 U.S.C. § 15(c)), by relaxing evidentiary standards for proving damages in such cases (§4D of the Act, 15 U.S.C. § 15d), and by providing that aggregate damages could either be allocated among injured consumers or paid into the state treasury as a civil penalty (§4E of the Act, 15 U.S.C. § 15e). These remedial provisions, which are indeed the heart of the Act,[42] were thoroughly and extensively debated. It is highly instructive, by contrast, that the idea of granting state attorneys general a "preferred position" in acquiring federal grand jury materials was never discussed. While the creation of that particular "preferred position," like those changes explicitly adopted by Congress, might have "maximized" antitrust enforcement in some sense, that fact cannot supply any legitimate basis for implying

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[41] *See, e.g., id.* at 8: "HR 8532 is a response to the judicial invitation extended in [*California* v. *Frito-Lay, Inc., supra*, 474 F.2d at 778]. The thrust of the bill is to overturn *Frito-Lay* by allowing State attorneys general to act as consumer advocates in the enforcement process, while at the same time avoiding the problems of manageability which some courts have found under Rule 23."

[42] The House thought the *parens patriae* provisions to be the central focus of this reform (H.R. Rep. No. 94-489, 94th Cong., 1st Sess. 8 (1975)), while the Senate conferees found the aggregation of damages provisions to be "the very essence of the bill." S. Rep. No. 94-803, 94th Cong., 2d Sess. 6, 46-51 (1976).

a change in the law that Congress never contemplated, and certainly did not explicitly adopt.

Not only did the Ninety-fourth Congress evidence no recognition of any need to create a "preferred position" for state attorneys general under Rule 6(e), but the facts show that the absence of such a preference has not impeded the prosecution of state-initiated antitrust actions. Indeed, the number of such actions has steadily increased since the Hart-Scott-Rodino Act became law (*see generally*, Empirical Research Project, *Reviving State Antitrust Enforcement: The Problems With Putting New Wine In Old Wine Skins*, 4 J. Corp. L. 547 (1979)), and a staggering number of these suits have been decided in favor of the states. A 1979 research study found that 305 of 307 reported state antitrust enforcement actions had resulted in judgments for the states. *Id.* at 632 n. 858. The obvious explanation for this fact is that a plenitude of information, including many federal law enforcement files as well as materials obtained through normal civil discovery, state grand jury proceedings, and state civil investigative demands, is already available to state prosecutors. *See* Note, *Disclosure of Grand Jury Materials Under Clayton Act Section 4F(b)*, 79 Mich L. Rev. 1234, 1245, 1257-68 (1981) (showing that state attorneys general have greatly exaggerated any need for grand jury materials).[43]

Petitioner seeks to minimize the importance of these materials by asserting (Br. 15) that "the grand jury is the primary tool" in federal antitrust investigations. As a matter of fact, however, the Department of Justice and

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[43] Moreover, as the district court recognized (Pet. App. 39a), grand jury materials remain available to state attorneys general, subject only to the traditional requirements of Rule 6(e). Although petitioner would like to avoid those requirements altogether, they have not proven burdensome. *See, e.g., Illinois* v. *Sarbaugh*, 552 F.2d 768, 776-77 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977).

F.B.I. Staffs extensively investigate and analyze alleged antitrust violations. *See Antitrust Division Manual* at VII-15 (Aug. 27, 1979) ("Frequently, the F.B.I. conducts or assists in conducting federal antitrust investigations"); J. von Kalinowski, *16 L Business Organizations Antitrust Laws and Trade Regulations*, §§ 91.03-.04; Mahaffie, *Criminal Antitrust Investigations*, 41 Antitrust L.J. 521 (1972); Steinhouse, *The Effect Of Justice Department and FTC Cases on Private Antitrust Litigation*, 34 Ohio St. L.J. 490, 492 (1973).[44] In this case, for example, nu-

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[44] In view of petitioner's assertion (Br. 7, 18) that its Section 4F(b) request resulted in the production of only 19 pages of material, it is significant that the district court held (Pet. App. 32a) that petitioner was also entitled to the obviously more extensive materials that were "originally the property of the prosecutor or government investigator and voluntarily turned over by them to the Grand Jury". The record does not show whether petitioner has received, or even requested, these additional materials.

It is likewise significant that petitioner limited its Section 4F(b) request to grand jury materials and presentencing memoranda (*see* J.A. 12), while the private parties seeking disclosure requested any and all materials prepared by, or in the possession of, the Department of Justice. *See, e.g., Piping Plaintiffs' Petition for Order Permitting Release of Grand Jury Testimony and Related Materials* 1 (filed April 10, 1980). As respondents pointed out in the court of appeals (C.A. Br. 29, n.*), the United States steadfastly opposed the broad disclosure sought by the private parties, both on the ground that the Attorney General's investigative files were beyond the scope of Fed. R. Crim. P. 6(e), which was the only statutory provision applicable to the private parties' requests, and on the additional ground that these files were otherwise privileged. *See Reply Memorandum for the United States* 3-7 (filed July 17, 1980). Although the question whether such materials must be produced to the states under Section 4F(b) is not before the Court (because of petitioner's limited request), the plain language of Section 4F(b) suggests that petitioner would be entitled to these materials. If petitioner's Section 4F(b) request was less productive than petitioner might have hoped, the fault lay not with Section 4F(b) or the Seventh Circuit's construction of the law, but with the scope of petitioner's request.

merous immunized witnesses testified before the grand jury. The executive branch certainly must have undertaken a thorough investigation before deciding to immunize these witnesses.

Moreover, even if the grand jury were "the primary tool" of the Antitrust Division, as petitioner asserts (Br. 15), that "fact" would be immaterial to the proper construction of Section 4F(b) unless it also could be shown that Congress knew that to be the case in 1976, when it enacted Section 4F(b). Not only did the court of appeals note (Pet. App. 6a) that it had not been aware of this "fact", but petitioner has pointed to no statement by any Senator or Member of Congress to show that Congress was so aware in 1976. The United States asserts (Br. 19) that Congress knew that the Antitrust Division "uses grand juries 'in criminal antitrust investigations.'" However, that assertion does not show that Congress understood that antitrust investigations proceed *principally* through the grand jury process, without any substantial, executive branch investigation, as the United States claims. Nor does this assertion prove petitioner's contention (Br. 15) that Congress understood that "grand jury materials are virtually indistinguishable from and commingled with what remains within the investigative files of the government attorney."[45]

Indeed, Congress described the process of a federal criminal investigation in quite different terms in 1977, when it considered proposed amendments to Rule 6(e) (S. Rep. No. 95-354, 95th Cong., 1st Sess. 6 (1977)):

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[45] Although the United States does not acknowledge the fact, recent statistics indicate that the Antitrust Division has preferred to use civil investigative demands in antitrust investigations since the Hart-Scott-Rodino Act strengthened the provisions of the Clayton Act relating to civil investigative demands. American Bar Association, *Antitrust Law Developments: Third Supplement: 1974-1980* at 127 (1981). *See also* pages 33-34, *supra*.

> Federal crimes are investigated by the FBI, the IRS, or by Treasury agents and not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries.

If Congress had actually believed in 1976 that criminal antitrust investigations proceed in a far different manner, it surely would have so noted in 1977, when it was addressing a subject to which that understanding would have been directly relevant.[46]

Petitioner also asserts that the holding below makes Section 4F(b) "superfluous" and "meaningless" because it gives state attorneys general "no valuable information whatever" (Pet. Br. 17, 41-42). In effect, petitioner argues that Congress *must* have meant to include grand jury records within Section 4F(b) because the Attorney General, as an informal matter, already was sharing his "non-privileged investigative materials" with state law enforcement officials in 1976. *See* C.A. Br. at 21 (filed April 15, 1981). Even if petitioner's factual assertion is correct, Section 4F(b) is far from inconsequential because it gave the force of law to an informal practice, thus ensuring uniformity and reducing the likelihood of any challenges to it.[47]

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[46] At most, petitioner's argument suggests that the Ninety-fourth Congress might have misunderstood the manner in which "most" criminal antitrust investigations may be conducted, in which event all the more reason exists for Congress, rather than for this Court, to rewrite Section 4F(b) as petitioner would have it.

[47] The provision of the Federal Trade Commission Improvements Act relied upon by the amici (Br. n.3) was enacted for precisely the same purpose. The very cases cited by the amici show that state attorneys general had been granted access to the Commission's "confidential" information *prior* to the enactment of the Federal Trade Commission Improvements Act, which simply formalized the Commission's pre-existing, informal practice. *See Jaymar-Ruby, Inc.* v. *FTC*, 496 F. Supp. 838, 842-43 (N.D. Ind. 1980).

Finally, it may suit the present purposes of petitioner and the amici to assert that the Attorney General's cooperation was exemplary in 1975 and 1976, but that clearly was not the view that the states expressed to Congress at that time. *See, e.g., Hearings on S.1284 Before the Subcommittee on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. 275 (1975) (remarks of Attorney General Miller of Virginia); *id.* at 361 (remarks of Mayor Alioto of San Francisco) ("For reasons that are inexplicable to me, the Department of Justice lawyers do not cooperate. . . ."). Congress was asked to, and did, promote cooperation by compelling the Attorney General to turn over his investigative materials "upon request". But Congress carefully limited this turnover to the Attorney General's own files and materials, and even then only "to the extent permitted by law."

**B. State Governmental Bodies Are Not Entitled to Special Access to Federal Grand Jury Records.**

Petitioner also asserts (Br. 38) that the disclosure it seeks would be "but a specialized application of the long-standing principle that governmental bodies are entitled to special status in obtaining access to grand jury materials." Not only is this argument inconsistent with petitioner's main contention that Congress intended to alter the law by enacting Section 4F(b) (since no such alteration would be necessary if this argument were correct), but it is also devoid of merit on its own terms.

The assertion (Pet. Br. 38) that governmental bodies "are entitled to special status in obtaining access to grand jury materials" has frequently been urged, as petitioner notes, but it also has been rejected by the courts as often as it has been made. For example, the Second, Third, Fifth and Seventh Circuits have each expressly required state attorneys general to comply with the particularized need

standard. *See, e.g., United States* v. *Sobotka*, 623 F.2d 764, 768 (2d Cir. 1980); *In re Grand Jury Matters*, No. 82-1035, slip op. at 9-10 (3d Cir. June 2, 1982); *Texas* v. *United States Steel Corp.*, 546 F.2d 626 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977); *In re Holovachka*, 317 F.2d 834, 836 (1th Cir. 1963).[48]

Thus, state law enforcement officials have consistently been required to show particularized need. Indeed, even the cases cited by petitioner (Br. 38) suggest at most that an asserted public interest might make particularized and compelling need easier to show, not that this requirement need not be met.[49]

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[48] The First, Sixth and Eighth Circuits have not directly addressed this issue. However, the Eighth Circuit has required city attorneys and state bar disciplinary committees to show particularized need, *In re Disclosures of Testimony Before the Grand Jury*, 580 F.2d 281, 286 (8th Cir. 1978), and district courts in the First and Sixth Circuits have held state law enforcement officials, including state attorneys general, to the same standard, *In re Grand Jury Proceedings*, 445 F. Supp. 349, 349-50 (D.R.I.), *appeal dismissed*, 580 F.2d 13 (1st Cir. 1978); *In re Disclosure of Grand Jury Transcripts*, 309 F. Supp. 1050, 1052-53 (S.D. Ohio 1970); *In re Brooke's Petition*, 229 F. Supp. 377, 378 (D. Mass. 1964). Only the Fourth and Ninth Circuits have applied a different standard, and then only in the context of a request made under Section 4F(b). *See United States* v. *Colonial Chevrolet Corp.*, *supra*, 629 F.2d at 950; *United States* v. *B.F. Goodrich Co.*, *supra*, 619 F.2d at 801.

[49] Contrary to petitioner's suggestion (Br. 38), the courts in both *In re Special February 1971 Grand Jury* v. *Conlisk*, 490 F.2d 894, 897 (7th Cir. 1973) and *In re Disclosure of Testimony Before the Grand Jury*, 580 F.2d 281, 286 (8th Cir. 1978), applied the particularized and compelling need standard set forth in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959), and *United States* v. *Procter & Gamble*, 356 U.S. 677, 682-83 (1958). Further, the courts in both *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960) and *In re Cement-Concrete Block Chicago Area Grand Jury Proceedings*, 1974-1 Trade Cases (CCH) ¶ 75,131, at

(footnote continued)

### C. Petitioner's Proposed Redrafting of Section 4F(b) Would Result in an Automatic and Wholesale Release of Grand Jury Records.

Petitioner also contends (Br. 43) that the disclosure it seeks is not inconsistent with the policy of Rule 6(e) because disclosure of grand jury materials would not be "automatic" and would not reduce the long-established role of the courts to a merely "ministerial" function. Thus, petitioner emphasizes (Br. 43) that the supervising court; (a) would be required to delay release of grand jury materials until after the conclusion of any federal criminal trial, (b) would then be required to determine that the

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(footnote continued)
97,053 (N.D. Ill. 1974), essentially rested their holdings on the conclusion that no issues of grand jury secrecy were presented because the requested *documents* were sought for their "intrinsic value," not for purposes of determining what had transpired before the grand jury. Finally, the Second and Seventh Circuits have not given these holdings the broad reading that petitioner suggests. *See In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 36 (2d Cir. 1981), *petition for cert. pending sub nom. Connecticut* v. *Cuisinarts, Inc.*, No. 81-1595 (filed Feb. 17, 1982); *United States* v. *Sobotka*, 623 F.2d 764, 768 (2d Cir. 1980); *In re Holovachka*, 317 F.2d 834, 836-37 (7th Cir. 1963); Pet. App. 10a.

Petitioner also suggests (Br. 11) that Congress would have been wise to carve out the exception that petitioner seeks so that state attorneys general could secure grand jury materials "without having to spend substantial time and money duplicating work already done." Of course, Congress did choose to reduce such potential, but only to the extent of providing for the turnover of the Attorney General's own investigative materials. Moreover, the courts have consistently found this rationale inadequate to support the wholesale release of grand jury materials that petitioner seeks here. *See, e.g., United States* v. *Procter & Gamble Co., supra*, 356 U.S. at 682-84; *Minnesota* v. *United States Steel Corp.*, 44 F.R.D. 559, 579-81 (D. Minn. 1968); *Application of State of California to Inspect Grand Jury Subpoenas*, 195 F.Supp. 37, 41 (E.D. Pa. 1961). Congress surely would have mentioned such clear authority if it had intended to overrule it.

materials requested "are or may be relevant to [an] actual or potential cause of action," and (c) would also afford respondents an opportunity to object. *See also* U.S. Br. 26-28.

However, the authority that this scheme reserves to the courts is illusory. It is surely no more than a ministerial act to determine whether the Department of Justice has concluded a criminal prosecution. Moreover, if relevance may be established simply by showing that a civil complaint tracks the allegations of any indictment that has been returned, as petitioner claims (*see Supplemental Memorandum of the State of Illinois in Support of Petition to Inspect and Copy Grand Jury Materials and Presentencing Memoranda* at 1, 6 (filed May 19, 1980)), any determination of relevance would also constitute a ministerial act. Indeed, the language of Section 4F(b) is even broader in that it provides that materials must be turned over upon request whenever they "*may* be relevant to . . . [a] *potential* cause of action." 15 U.S.C. § 15f(b) (emphasis added). Thus, as a practical matter, a party opposing disclosure could do nothing at all to rebut an affidavit stating that certain grand jury materials "may be relevant to some potential cause of action."

The turnover required under petitioner's view would be wholesale, automatic, and ministerial.[50] The only role left

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[50] In addition to asking this Court to decide whether Section 4F (b) abrogates the particularized need standard, petitioner suggests (Br. 30) that this Court should now balance petitioner's claims against "the need for continued secrecy in this case." Petitioner then reiterates the arguments that it made in support of its Rule 6(e) application in the district court. *Compare* Pet. Br. 30-33 *with Memorandum of the State of Illinois in Support of Petition to Inspect and Copy Grand Jury Materials and Presentencing Memoranda* at 7-15 (filed May 19, 1980). As the district court correctly noted (Pet. App. 38a), petitioner's arguments grossly overstate the extent to which the materials at issue have already been disclosed and sub-

(footnote continued)

for the courts would be to set the terms of a protective order, which is quite a separate issue.

### D. Protective Orders Alone Cannot Adequately Safeguard Grand Jury Secrecy.

Petitioner has also suggested (Br. 42-49) that its construction of Section 4F(b) is consistent with Rule 6(e) because the courts would continue to perform their traditional role of supervising the release of grand jury materials by means of protective orders. The most compelling response to this suggestion is that Section 4F(b) does not in terms contemplate any such role for the courts. *See also* page 11, note 10 and pages 22-34, *supra*.

Moreover, petitioner's posture in this litigation, where it is only one of several named co-class representatives in one of three cases that have been consolidated in the district court, either totally or for discovery, demonstrates the inherent impracticability of enforcing any meaningful protective order. Essentially, petitioner would be required to deny to its fellow class representatives the very materials that it claims necessary to conduct the litigation. At the same time, petitioner's disclosure of those materials in preparation for depositions, briefs and other matters would seem inevitable.

It is singularly instructive that the United States, while arguing (Br. 27) that protective orders are sufficient to protect the privacy interests of witnesses and the innocent accused, as well as the institutional integrity of the grand

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(footnote continued)
stantially understate the need for continued secrecy. *See also Joint Brief In Opposition* at 11-27 (filed June 16, 1980). To the extent that petitioner is now attempting to claim that it met traditional Rule 6(e) standards, that claim is not substantiated by the record. *See* page 4, note 3, *supra*. Moreover, it need not now be considered in any event because it is beyond the scope of this Court's grant of certiorari.

jury, frankly admits that it is unwilling to rely on such orders to protect the secrecy of matters which *it* desires to remain secret (U.S. Br. 26 n.19). The government's special pleading notwithstanding, it is obvious that only a firm rule of general applicability can provide adequate assurance that grand jury testimony will not needlessly be disclosed. If Congress believes that the existing standard is inappropriate in cases such as this, it is for Congress to establish a new standard, which it has not seen fit to do.

Finally, it is instructive that the United States asks this Court to read into Section 4F(b) the very provisions that would have been specifically provided if Congress had adopted the Senate alternative to Section 4F(b), which was, of course, rejected. *See* pages 25-34, *supra*.

## CONCLUSION

The language and legislative history of Section 4F(b) clearly demonstrate that Congress did not intend to alter the law of grand jury secrecy by permitting state attorneys general to secure access to federal grand jury materials absent a judicial determination of particularized and compelling need. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 13, 1982

## APPENDIX A

## STATUTE AND RULE INVOLVED

Section 4F of the Clayton Act, 15 U.S.C. § 15f, as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, Section 301, 90 Stat. 1395-1396, provides:

> (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under sections 12 to 27 of this title based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.
>
> (b) To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under Sections 12 to 27 of this title.

Rule 6(e) of the Federal Rules of Criminal Procedure provides in pertinent part:

> (2) [A]n attorney for the government . . . shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.
>
> (3)(c) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding . . . .

## APPENDIX B

Section 202(k) & (l) of S.1284 would have provided:

"(k) The Attorney General, unless he determines it would be contrary to the public interest, shall upon written request from the Federal Trade Commission, after completion of any civil or criminal proceeding instituted by the United States and arising out of any grand jury proceeding or after the termination of any grand jury proceeding which does not result in the institution of such a proceeding, permit the Commission to inspect and copy any documentary material produced in and the transcripts of such grand jury proceeding. While such materials are in the possession of the Commission, the Commission shall be subject to any and all restrictions and obligations placed upon the Attorney General with respect to the secrecy of such materials."

"(l) Any person that institutes a civil action under this Act may, upon payment of reasonable charges therefor and after completion of any civil or criminal proceeding instituted by the United States and arising out of any grand jury proceeding inspect and copy any documentary material produced in and the transcript of such grand jury proceeding concerning the subject matter of such person's civil action. Any action or proceeding to compel the grant of access under this subsection shall be brought in the United States district court for the district in which the grand jury proceeding occurred. The court may impose conditions upon the grant of access and protective order that are required by the interest of justice."

# Respondent's Brief

# 2

No. 81-1114

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CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ILLINOIS,

*Petitioner,*

vs.

ABBOTT & ASSOCIATES, INC., et al.,

*Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## BRIEF FOR RESPONDENTS CLIMATEMP, INC. AND VICTOR COMFORTE

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## QUESTION PRESENTED

Whether grand jury materials which are traditionally under the control and supervision of the courts are included in the "investigative files and other materials" whose disclosure by the U.S. Attorney General is mandated by Section 4F(b) of the Clayton Act, Section 15 U.S.C. 15f(b).

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# In the Supreme Court of the United States

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## BRIEF FOR RESPONDENTS CLIMATEMP, INC. AND VICTOR COMFORTE

### OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 659 F.2d 800 (7th Cir. 1981) and are printed as Appendix A to Petition for Writ of Certiorari (hereinafter "Pet. App.") pp. 1a-18a; 21a. The decision of the District Court is reported in 1980-81 Trade Cases (CCH) Par. 63,771 at 78,103 (N.D. Ill.) and appears as Appendix F, Pet. App., pp. 26a-39a.

## JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1981. On September 30, 1981, the panel opinion was modified to reflect that it had been circulated among all circuit judges in regular active service, none of whom favored rehearing *en banc*. The petition for a writ of certiorari was filed on December 15, 1981 and granted on March 22, 1982. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

## STATUTE AND RULE INVOLVED

Section 4F of the Clayton Act, 15 U.S.C. 15f, as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, pub. L. No. 94-435, Section 301,90 Stat. 1395-1396, provides:

> (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under Sections 12 to 27 of this title based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.
>
> (b) To assist a State attorney general in evaluating the notice or in bringing any action under Sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under Sections 12 to 27 of this title.

Rule 6(e)(3), Federal Rules of Criminal Procedure, provides in pertinent part:

(3) *Exceptions.*

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

## STATEMENT OF THE CASE

On June 12, 1978, a 13-count indictment was returned by the August 1977 Grand Jury sitting in the Northern District of Illinois at Chicago, Illinois. The case was entitled *United States* v. *Climatemp, Inc., et. al.*, No. 78 CR 388. It charged 19 corporations, 13 individuals and a labor union with conspiracy to rig bids on public sheet metal projects in the Chicago area in violation of Title 15 U.S.C. §1 and Title 18 U.S.C. 1341. Respondents Climatemp, Inc. and Victor Comforte were defendants in that case.

On March 8, 1980, Climatemp, Inc. and Victor Comforte were found not guilty of all charges.

On November 21, 1979, the State of Illinois filed a class action law suit under the Clayton Act, 15 U.S.C. Sections 15 and 26, on behalf of itself, the Chicago Board of Education, and all other public entities similarly situated in Illinois. *State of Illinois* v. *Climatemp, Inc., et al.*, 79 C 4898 (N.D. Ill.).

On January 31, 1980, the State of Illinois petitioned the District Court for the Northern District of Illinois for disclosure of grand jury materials pursuant to Section 4F(b) and Rule 6(e), Fed.R.Crim.P. (J.A. 11). The Department of Justice supported the State's application for a court order releasing these materials. Climatemp, Inc. and Victor Comforte objected in the District Court to the disclosure of grand jury materials to the State of Illinois.

Chief Judge James B. Parsons denied the State's petition, ruling that Section 4F(b) did not apply to materials acquired by and belonging to the grand jury, and required the State of Illinois to demonstrate a particularized need for disclosure of the requested materials as mandated by

Rule 6(e) of the Federal Rules of Criminal Procedure. (Pet. App. 26(a)) The State appealed from the District Court's order denying its petition.

On September 16, 1981, the United States Court of Appeals for the Seventh Circuit affirmed. *State of Illinois* v. *Abbott & Associates, Inc., et al.*, 659 F.2d 800 (7th Cir. 1981). The Court of Appeals concluded that Congress had not intended to include grand jury materials among the "investigative files or other materials" that the Attorney General was required by §4F(b) to disclose to the State Attorneys General. The court further held that Congress, in enacting §4F(b), had not intended to relieve State Attorney Generals of showing particularized and compelling need as traditionally required.

## SUMMARY OF ARGUMENT

Section 4F(b) states that the Attorney General "shall" "upon request" disclose to State Attorneys General its "investigative files and other materials". No mention is made in the statute that grand jury materials are to be included in this disclosure. The State of Illinois and United States argue that, since no mention is made of grand jury materials, it is reasonable to assume that Congress meant grand jury materials to be included in those materials to be disclosed. This argument fails to recognize the uniqueness of grand jury materials in our judicial system and the long-standing policy regarding the secrecy of grand jury proceedings.

Rule 6(e) of the Federal Rules of Criminal Procedure, has, since its passage in 1946, governed the disclosure of grand jury materials in all instances. The cases interpreting Rule 6(e) have been clear and unanimous in their pronouncement that disclosure shall only be made upon a

showing of particular and compelling need. In doing so, the courts have attempted to balance the need for secrecy with the need for disclosure. It is unreasonable to assume, or even to argue, that Congress would change a law of such "ancient vintage" as well as Rule 6 without making explicit reference to that change.

This becomes more apparent by the fact that Rule 6 has been amended twice since the passage of 4F(b). The first amendment in 1977 specified which persons would be entitled to grand jury materials and on what basis they would be granted disclosure. At no time during the discussions of these amendments was any reference made to Congress' intent to change existing law or to give State Attorneys General any special status. References to the continued viability of the court's supervisory power and discretion regarding grand jury materials is evidenced in the legislative history of both 4F(b) and the subsequent amendments to Rule 6. The legislative history of both make a specific reference to the continued validity of "existing law".

Apart from the fact that Congress evidenced no intent to change existing law is the fact that the statute mandates disclosure by the Attorney General without reference to the court or Rule 6(e). If 4F(b) is to be given its literal meaning, the Attorney General must turn over all its "investigative files and other materials" without reservation. This effectively eliminates Rule 6(e) and the court's traditional supervisory control over grand jury materials. This tortured interpretation is itself persuasive that grand jury materials are not to be included in the disclosure mandated by 4F(b).

Section 4F(b) states that the United States Attorney General "shall" disclose its "investigative files and other

materials" when requested by the State Attorney General. The word "shall" mandates that those "investigative files and other materials" be disclosed. However, it is clear from the Department of Justice Antitrust Division Manual that many materials are not, as a matter of policy, disclosed to State Attorneys General "upon request". Among those materials not disclosed are grand jury materials and other investigative materials in pending prosecutions, raw F.B.I. reports, the identity of confidential informants, and legal analysis memoranda. Thus, it would appear that the Department of Justice's policy, as set out in its Antitrust Division Manual, is inconsistent with the arguments made in its brief in this case. It also appears that the Department of Justice's interpretation of the word "shall" in 4F(b) is somewhat self-serving. It is patently unreasonable to conclude that Congress mandated the disclosure of grand jury materials while allowing the Department of Justice to retain discretion regarding other more conventional, less unique investigative materials. This contrast is striking.

More revealing are the Department of Justice's statements in its Manual regarding the reasons for not disclosing grand jury materials in pending prosecutions. The Manual states that disclosure prior to the completion of the prosecution at the District Court level might compromise or somehow hinder their prosecution. This is not an unreasonable conclusion. In fact, this is the same reasoning traditionally used by this Court and the Courts of Appeals in determining whether a compelling and particular need has been shown. It is the same balancing test performed by the courts under Rule 6(e)(3)(C) in deciding whether disclosure is justified. However, the discretion regarding disclosure rests not with the Department of Justice, but with the courts. Nothing in 4F(b) shifted or changed this standard. If, however, "investi-

gative files and other materials" does include grand jury materials, then no discretion exists since 4F(b) uses the word "shall". Congress did not mean to include grand jury materials among those materials whose disclosure is mandated by 4F(b). Grand jury materials were meant to be governed by Rule 6, the existing law which is long-standing, unanimous, and well-known. Whether grand jury materials should be disclosed must be decided on a case by case basis and the discretion to do so resides in the courts.

What this Court should do is give the word "shall" its plain, ordinary meaning and give the phrase "investigative files and other materials" the meaning Congress intended. This will accommodate the needs of the Department of Justice and allow the courts to balance the need for disclosure with the requirements regarding grand jury secrecy.

The petitioner's brief suggests that, absent the automatic disclosure of grand jury materials, the Hart-Scott-Rodino Act is rendered meaningless. This argument ignores the revolutionary changes in the antitrust law that the Hart-Scott-Rodino Act effected. Prior to its passage, State Attorneys General were not allowed to maintain parens patriae actions on behalf of its citizens in antitrust situations. In an opinion denying that right, the Ninth Circuit Court of Appeals suggested legislation in order to allow such law suits. The Hart-Scott-Rodino Act was a response to that invitation. It attempted to do away with problems regarding Rule 23 of the Federal Rules of Civil Procedure regarding class certification, problems in management once the class had been certified, and efforts to distribute the proceeds from any damage claims.

The courts below recognize that State Attorneys General were not being denied grand jury materials, but merely being required to make a showing of need as mandated by 6(e) and the case law interpreting it. Thus, the intimation in their briefs that they are somehow being denied grand jury materials is inaccurate. They may secure those materials as they always have under the customary standards of Rule 6(e). Had Congress intended to change that rule, it would have stated so explicitly.

The judgment below is correct and should be affirmed.

## ARGUMENT

**NOTHING IN §4F(b)'s LANGUAGE OR ITS LEGISLATIVE HISTORY OR ANY OTHER PROVISION OF THE HART-SCOTT-RODINO ACT, SUPPORTS THE CLAIM THAT GRAND JURY MATERIALS ARE PART OF THE "INVESTIGATIVE FILES OR OTHER MATERIALS" OF THE U.S. ATTORNEY GENERAL. MOREOVER, §4F(b) SPECIFICALLY LIMITS DISCLOSURE "TO THE EXTENT PERMITTED BY LAW". RULE 6 FEDERAL RULES OF CIVIL PROCEDURE SPECIFICALLY MAKES DISCLOSURE OF GRAND JURY MATERIALS SUBJECT TO THE COURT'S DISCRETION AND A SHOWING OF PARTICULAR AND COMPELLING NEED.**

### A. LANGUAGE OF THE STATUTE DID NOT CHANGE EXISTING CASE LAW.

§4F(b) *requires* the United States Attorney General, upon request by a State Attorney General, to disclose

> "to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under [this Act]." 15 U.S.C. §15F(b) (1976)

The Seventh Circuit, in the case below, correctly interpreted this clause as not intended to change existing law requiring a showing of need with particularity per Rule 6 of the Federal Rules of Criminal Procedure.

The starting point for the court's interpretation of the statute was the language itself. Absent a clearly expressed legislative intent to the contrary, the language of the statute must ordinarily be viewed as conclusive.

*Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980). This is especially true in this situation where the case law, as well as the Supreme Court rule, is clear, well known, and long standing. Fed.R.Crim.P. Rule 6(e)(3)(C). *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 222 (1979); *Dennis* v. *United States*, 384 U.S. 855, 872 (1966); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959); *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683 (1958). When intending to include grand jury materials within the meaning of a more general term, Congress has expressly included a specific reference to the grand jury. T. 18 U.S.C. 3500;[1] Rule 16, Federal Rules of Criminal Procedure.[2]

The Seventh Circuit noted first off that grand jury materials are not mentioned in the statute and that there was no reason to assume that Congress meant to include them in the term "investigative files and other materials".

> "We find it difficult to believe that Congress—without a word of discussion—intended a general phrase like 'investigative files and other materials' to include grand jury materials." *In Re State of Illinois Petition To Inspect, etc.*, 659 F.2d 800, 803 (7th Cir. 1981).[3]

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[1] T. 18 U.S.C. 3500(e)(3) states:

"A statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

[2] Rule 16(a)(1)(A) states:

"Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: . . . recorded testimony of the defendant before a grand jury which relates to the offense charged."

[3] In a footnote (No. 8) to this statement, the court points out that "the only reference to grand jury materials in the legislative history is strong evidence that they were specifically excluded".

While grand jury materials are maintained by the Department of Justice, they remain the records of the court, and they can only be made available under the specific provisions of Rule 6(e)(3)(A) and (B) or upon application to the court, Rule 6(e)(3)(C). As pointed out in the Seventh Circuit's opinion, had Congress "intended to make a change in the law of grand jury disclosure", some reference would have been made to the court as opposed to or in addition to the Attorney General of the United States. This could have been accomplished in the statute itself or in an amendment to Rule 6.

This Court acknowledged long ago that the grand jury is "an appendage of the court" and dependent upon it. *Brown* v. *United States,* 359 U.S. 41, 49 (1959). Several years later, in an opinion by Justice Frankfurter, this court reiterated the relationship between the grand jury and the court. *Levine* v. *United States,* 362 U.S., 610, 617 (1960). *Quoting Cobbledick* v. *United States,* 309 U.S. 323, 327 (1940), the Court in *Levine* recognized the control over the grand jury traditionally exercised by the judicial branch of our government:

> " 'The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the court to which it is attached and to which, from time to time, it reports its findings. The proceeding before a grand jury constitutes 'a judicial inquiry', *Cobbledick* v. *United States,* 309 U.S. 323, 327, 84 L.Ed.2d 783, 786, 60 S.Ct. 540."
>
> *Levine* v. *United States,* 362 U.S. 610, 617 (1960).

Rule 6(e)(3)(C)(i) is only a recognition of this fact. See also *Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S.

211 (1979). As the Supreme Court said in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959):

> "any disclosure of grand jury minutes is covered by Fed. Rules of Crim. Proc. 6(e) promulgated by this Court in 1946 after approval of Congress. In fact, the federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it." *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 398-399, 3 L.Ed.2d 1323, 1326 (1959)[4]

This principle was reiterated by this Court in *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979).[5] Making reference to that portion of Rule 6 of the Federal Rules of Criminal Procedure dealing with disclosure, the Court noted that the district court had supervisory power over the release of grand jury materials. In doing so, it reaffirmed the necessity of showing "particularized need" so that the court could accommodate the competing interests in secrecy and disclosure. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 220-221 (1979).

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[4] Justice Whittaker, in his concurring opinion in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 684-685 (1958) was of the opinion that:

> "grand jury minutes and transcripts are not the property of the government's attorneys, agents, or investigators . . . instead those documents are records of the court".

[5] This Court's strongest statement regarding secrecy of grand jury proceedings came in the recent *Douglas Oil Co.* v. *Petrol Stops* case and, as pointed out by the Court, has been an integral part of our system of justice since before the founding of our republic. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979).

## B. THE LEGISLATIVE HISTORY IS UNEQUIVOCAL REGARDING NO CHANGE IN EXISTING CASE LAW.

The legislative history of the Hart-Scott-Rodino Act reveals that §4F(b) continues both the Rule 6(e) requirements and the standards imposed by the case law interpreting it. In his explanation of 4F(b), Senator Abourezk, Senate Floor Manager for the legislation, assured the Senate that this section of the Act would *not* allow easier access to grand jury materials.

> "*The section* [4F(b)] *specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. Under existing law, he cannot turn over materials given in response to a grand jury demand* or to a civil investigative demand. Therefore, this section is limited by existing law to cases where materials were turned over voluntarily." 122 Cong. Rec. 29,160 (Daily ed. September 7, 1976) (emphasis added)

Rather than intending to change the law, the sponsor of the legislation makes reference to existing law and its continuing viability.

§4F(b) also contains the phrase "to the extent permitted by law". At the time that this statute was enacted "existing law" included Rule 6(e) Federal Rules of Criminal Procedure, as well as Supreme Court and Court of Appeals decisions interpreting it. These decisions were clear, concise, long standing and unanimous in requiring a showing of "particularized need." *See Dennis* v. *United States,* 384 U.S. 855 (1966); *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959); *United States* v. *Procter & Gamble Co.,* 356 U.S. 677 (1958). In a recent reference to Rule 6(e) in *Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. 211, 222 (1979), this Court reiterated that long-standing role, stating that:

"Parties seeking access to grand jury transcripts under Rule 6(e) must show that the material they seek is *needed* to avoid a possible injustice in another proceeding, that the *need for disclosure* is greater than the need for continued secrecy and that their request is structured to cover only material so needed." emphasis added) *Douglas Oil* v. *Petrol Stops Northwest*, 441 U.E. 211, 222 (1979)

## C. SUBSEQUENT AMENDMENTS TO RULE 6 FEDERAL RULES OF CRIMINAL PROCEDURE REGARDING GRAND JURY DISCLOSURE REITERATE THE CONTINUING VIABILITY OF EXISTING CASE LAW.

Subsequent to the enactment of §4F(b), Rule 6(e) was amended in 1977 and again in 1979. The purpose of the 1977 amendment was to specify which persons are entitled to access to grand jury materials. See S.Rep. No. 354, 95th Congress, 1st Session 5-8 (1977) reprinted in [1977] U.S. Code & Cong. Adm. News, 529-532. The 1977 amendment specified those entitled to automatic access (Rule 6(e)(3)(A)) and required the government to notify the court of "the names of persons to whom such disclosure has been made". (Rule 6(e)(3)(B)) This automatic disclosure procedure is in sharp contrast to the wording of Section 4F(b). The 1979 amendment related to the recording and preservation of testimony before the grand jury. Neither of these amendments nor the legislative history indicate any intention to change well-known case law regarding disclosure of grand jury testimony. Both of these amendments to Rule 6, however, show Congress' sensitivity to the secrecy of grand jury proceedings and to the large and long-standing body of case law which has built up regarding that important concept. The fact that Congress chose not to add explicit language regarding the right of access by State Attorneys General is another in-

dication that the existing law was not changed nor intended to be changed. Moreover, the Legislative Report on the 1977 amendment makes it clear that Rule 6(e) was to provide a clear and precise limitation on grand jury disclosure:

> "[t]he Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce *non-criminal Federal laws* by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under Paragraph (c) be obtained to authorize such a disclosure." (emphasis added) S.Rep. No. 354, 95th Cong., 1st Session 8 (1977) reprinted in [1977] *U.S. Code Cong. & Admin. News,* 531-532.

The Senate Report also states that access to grand jury materials for use in civil cases should remain the same as "the case today under prevailing court decisions". The Report cites *Procter & Gamble Co.,* 356 U.S. 677 (1958) as such a court decision. S.Rep. No. 354, *supra* at 8 [1977] *U.S. Code Cong. & Admin. News, supra* at 532. Thus, Congress was explicit in its intent to restrict disclosures of grand jury materials to existing case law, i.e. to those who could show a "particularized need" as defined in *Procter & Gamble Co.,* 356 U.S. 677 (1958). State Attorneys General are not "entitled to special status" which Rule 6 gives to "an attorney for the government" or "government personnel" in Rule 6(e)(3)(A)(i) and (ii) respectively.[6]

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[6] The suggestion on page 38 of the State of Illinois brief that a State Attorney General is somehow elevated to a special status is not supported by the cases cited there, i.e. *In the Matter of Disclosure of Testimony Before the Grand Jury,* 580 F.2d 281 (8th Cir. 1978); *Special February 1971 Grand Jury* v. *Conlisk,* 490 F.2d 894 (7th Cir. 1973); *United States* v. *Interstate Dress Carriers, Inc.,*

(footnote continued)

This "special status" argument has been made previously and rejected by various reviewing courts. *United States* v. *Sobotka*, 623 F.2d 764, 768 (2nd Cir. 1980); *In Re Grand Jury Matters*, No. 82-1035, slip op. at 10 (3rd Cir. June 2, 1982); *Texas* v. *United States Steel Corp.*, 546 F.2d 626 (5th Cir. 1977) *cert. den.* 434 U.S. 889 (1977); *In Re Holovachka*, 317 F.2d 834 (7th Cir. 1963); *In Re Disclosure of Testimony Before the Grand Jury*, 580 F.2d 281, 286 (8th Cir. 1978); *In Re Grand Jury Proceedings*, 445 F.Supp. 349, 350 (D.R.I. 1978), appeal dismissed, 580 F.2d 13 (1st Cir. 1978); *In Re Disclosure of Grand Jury Transcripts*, 309 F.Supp. 1050, 1052-53 (S.D. Ohio 1970); *In Re Brooke*, 229 F.Supp. 377, 378 (D.Mass. 1964). No exception to the "particularized need" requirement has been recognized, not for State Attorneys General, city attorneys, or State bar disciplinary committees.

## D. USE OF THE WORD "SHALL" IN 4F(b) WITHOUT MENTION OF RULE 6, THE COURT OR THE GRAND JURY INDICATES NO CHANGE IN EXISTING CASE LAW.

Another interesting aspect regarding the wording of the statute is the use of the word "shall" in 4F(b):

> "the Attorney General of the United States *shall*, upon request by such State Attorney General, make available to him, to the extent permitted by law. . .".

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(footnote continued)

280 F.2d 52 (2nd Cir. 1960). In each of those cases, the Court merely found that the entity seeking discovery had made a showing of "particularized need". These defendants do not quarrel with the fact that a State Attorney General in a parens patriae situation may have a better argument regarding the question of the "need for disclosure" versus the "need for continued secrecy" than a private plaintiff. But this does not transform into an automatic right to the materials without a showing of "particularized need".

The Department of Justice responded to the Illinois Attorney General's request for "information pursuant to Section 4F(b)" (Joint Appendix, p. 5) by stating that the grand jury materials are subject to the requirements of grand jury secrecy set forth in Rule 6(e) of the Federal Rules of Criminal Procedure and, consequently, "may not be disclosed to you absent a court order". (Joint Appendix, p. 9) Both the United States and the State of Illinois acknowledge the necessity of applying to the court for the materials in question. The statute, however, refers to a mandatory transfer from the Department of Justice to the State Attorney General without reference to the court, i.e. use of the word *"shall"*.

If the statute means what it says—automatic disclosure upon request—then two possibilities exist. One, Rule 6 has no application since the Attorney General is mandated to disclose the materials on request. This seems unlikely since all the participants agree that a Rule 6(e) petition must be made. The second possibility is that the courts have been relegated to the mere ministerial task of saying yes without exercising any discretion. It seems unlikely that Congress would mandate disclosure by the Attorney General and thereby cause a revolutionary change in existing case law without making any reference to that change. The fact is that Rule 6(e) does apply and it specifically gives the court discretion to decide "if" "disclosure" should be ordered. The only conclusion to be drawn from this is that Congress, as stated by Senator Abourezk, did not intend to change existing case law.

Congress used plain, easily understood language when it used the word "shall" in 4F(b) and mandated the Department of Justice to disclose its investigative files and other materials. If Congress had meant to include grand jury materials, they would have said so in the same plain,

easily understood language and they would not have ignored the role of the courts, Rule 6(e) and existing case law.

Both the State of Illinois brief and brief for the United States place a great deal of emphasis on the fact that only nineteen (19) pieces of paper were provided to the State of Illinois by the government. State of Illinois brief, p. 7 and 18; United States brief, p. 3-4. They argue if "investigative files and other materials" does not include grand jury transcripts and documents, the phrase is meaningless. This argument ignores several facts and is self serving.

The attorneys for the government are the only individuals who know what is contained in their investigative files and to date no questions have been raised by the State of Illinois concerning what has been supplied them. In its brief, the United States states that the Illinois Attorney General:

> ". . . requested that all relevant information in the Antitrust Division's files be made available pursuant to Section 4F(b) of the Clayton Act, 15 U.S.C. 15f(b) (Pet. 6; Pet. App. 3a). The Antitrust Division responded on January 3, 1979, by producing copies of preliminary documents regarding the institution of the grand jury investigation, which totalled fewer than 20 pages. The Division informed the Illinois Attorney General's office that it was unable to supply other materials at that time—roughly 5500 pages of grand jury transcripts and thousands more pages of subpoenaed documents—because they were subject to the provisions of Fed. R. Crim. P. 6(e) and could only be disclosed pursuant to a court order (Pet. App. 3a).
>
> Brief of the United States pp. 3-4.

Notwithstanding these statements, it would appear that the Department of Justice, as a matter of policy, does *not* supply the state attorneys general with many types of information. They do *not* supply "raw F.B.I. investigative reports",[7] "identity of confidential informants",[8] and "work product analysis or other distributive memorandum".[9] These materials appear to be part of a general effort by the Department of Justice to unilaterally sanitize their files. Referring to the cooperation between the Department of Justice and State Attorneys General, the U.S. Department of Justice Antitrust Division Manual states:

> The Antitrust Division will disclose materials from its files to assist state attorneys general to the maximum extent possible or *appropriate* in fulfilling their state antitrust enforcement responsibilities. Thus, as a general practice, a liberal rule will apply to disclosures under Section 4F(b). There are, however, certain instances where, because of statute, case law or *other constraints,* non-disclosure, or at least *protective limitations* upon the disclosure made, *may be necessary. The Antitrust Division must retain discretion within these areas to make determinations concerning the proper scope of Section 4F(b) disclosures.*" *Antitrust Division Manual.* p. VII-11 (emphasis added)

That discretion is defined in terms of "policies (which) favor vigorous Federal and State enforcement of the antitrust laws". However, the Manual refers to

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[7] Antitrust Division Manual, p. VII-15.

[8] Antitrust Division Manual, p. VII-14.

[9] Antitrust Division Manual, p. VII-16.

> "a balance (which) must be struck between immediate disclosure of investigative files and federal enforcement priorities and necessities.[10]

It also states:

> "While it is the Division's policy to cooperate fully and liberally with state attorneys general, in some instances disclosure may be delayed or limited to preserve the integrity of Antitrust Division prosecutions or investigations."[11]

The statute says "shall". It does not state when "appropriate". It does not give the Department of Justice the option to make "protective limitations" nor limit disclosure because of "other constraints". It does not give them the right to unilaterally "retain discretion". It appears that part of the reason the State of Illinois only received nineteen pieces of paper is because the government decided to ignore the plain meaning of the word "shall" and to exclude some of the material in their files.

The government seems to use a definition of "investigative files and other materials" which leaves them the discretion to determine that certain unidentified materials are not included, while arguing to this Court that no such discretion exists as to the District Court. This self-serving argument is made in face of the fact that grand jury materials have always been treated uniquely by the courts. Rule 6's existence is uncontradictory evidence of this. Thus, while the government argues that the word "shall" mandates the disclosure of grand jury transcripts, it leaves the disclosure of various other materials to the discretion of the Antitrust Division. This obviously incongruous reasoning is partially the result of the efforts by the petitioners to read into the term "investigative files and other materials" something that was not intended.

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[10 & 11] Antitrust Division Manual VII-11.

There is yet another indication that Congress did not intend to include grand jury materials in Section 4F(b). The Antitrust Division Manual states that the Department of Justice will resist disclosure "where a grand jury investigation is completed, but a resulting prosecution is still pending". Antitrust Division Manual, p. VII-13. Thus, the government again reserves the right to exercise discretion. However, that discretion is inconsistent with the statute's mandate that the Attorney General "shall" disclose. Either grand jury materials are included or they are not. If the government's erroneous conclusion that "investigative files and other materials" includes grand jury transcripts and documents is true, then the government has no right to retain any discretion whether or not the case has been "completed". It must, according to 4F(b), disclose the materials "upon request".

The Antitrust Division's policy *may* be explained with reference to the necessity to balance the need for disclosure against the need for secrecy i.e. the same determination made by the court under Rule 6(e)(3)(C). But this necessarily means that the phrase "investigative files and other materials" does not include grand jury materials. There can be little doubt of the motivation for resisting disclosure in a still pending case, nor of Congress' affording the Antitrust Division the option of making that argument to the Court. But the clear implication of this reasoning is that grand jury materials are not within the materials which "shall" be disclosed "upon request". Rather, the traditional balancing test regarding "particularized need" will be evaluated by the Court. Thus, it would again seem clear that the mandated disclosure of 4F(b) does not and was not meant to include grand jury materials.

The fact is that it is not unusual in any investigation, antitrust or otherwise, for government attorneys to interview witnesses prior to their testimony before the grand

jury and/or prior to their testimony at trial.[12] This is especially so when plea agreements are entered into by the defendants/witnesses and the government.[13] These plea agreements usually call for the full and truthful cooperation of those witnesses in the investigation and subsequent prosecution, including availability for pre-trial interview.

The Department of Justice Antitrust Division Manual makes mention of precisely these types of materials. It states:

> In antitrust investigations, unlike many federal criminal investigations, some of the participants in the alleged conspiracy are among those who are likely to be immunized during the investigation. In those situations, it is required that Division attorneys obtain full and complete proffers of the testimony of those who are active participants in the conspiracy. The information obtained from the proffer should be provided to the Office of Operations and the Deputy Assistant Attorney General as soon as such information is available.

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[12] The District Court in the Climatemp criminal case made reference to such interview notes on pages 1738-1742 of the Climatemp criminal trial transcript. The transcript of the criminal Climatemp case, 78 CR 388 (Northern District of Illinois) is not part of this record, but is a public document on file in the United States District Court for the Northern District of Illinois, Clerk's office, 20th Floor, 219 South Dearborn Street, Chicago, Illinois 60604.

[13] In the Climatemp criminal case, 78 CR 388 (Northern District of Illinois) ten co-defendant witnesses testified. Nine of the ten were given immunity and the tenth gave a sworn statement to the government prior to his trial testimony. Each entered into a plea agreement with the government. The following are the page numbers of the Climatemp criminal trial transcript regarding the grant of immunity or sworn statement—278, 337, 693, 1053, 1205, 1343, 1470, 1539, and 1735. Mention of the plea agreement is made by the District Court on page 1748 of that transcript.

> Under most circumstances, the Division will not seek immunity authorization for an individual who is a target of the investigation unless that individual or counsel gives the Division a full and candid statement of the proposed testimony of the witness that complies with the public interest considerations necessary to seek immunity authorization. Antitrust Division Manual, p. III-63-64.

The court should also be aware of the fact that the Hart-Scott-Rodino Act came on the heels of the elevation of the T. 15 U.S.C. Section 1 to a felony. Thus, what had been a misdemeanor offense became a felony.[14] Since becoming a felony, long jail terms have been sought by the government and given in appropriate instances by the courts for antitrust violations, whereas previously a violation rarely resulted in significant jail time. These facts, when coupled with the immunity statute (T. 18 U.S.C. §6002), gave new and added meaning to being a defendant in a criminal antitrust case. Indeed, it is not unusual for indictments charging antitrust violations to also charge mail fraud (T. 18 U.S.C. §1341) and possibly RICO (T. 18 U.S.C. §1962) violations.[15]

The suggestion, veiled in the brief of the United States (page 18) and outright in the brief of the State of Illinois (page 15), that the United States does not use the F.B.I. in antitrust investigations is either untimely or inaccurate.

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[14] Prior to the amendment in 1974, the statute authorized only a $50,000 fine and a one-year jail term, whereas now the statute authorizes a $1,000,000.00 fine and up to three (3) years in jail.

[15] In the Climatemp case, the defendants were indicted on twelve (12) counts of mail fraud in addition to the Sherman Act charges. In the Borg and Reynolds cases, the defendants were also charged with mail fraud.

The Department of Justice's Antitrust Division Manual written in August 1979, states:

> "Frequently, the FBI conducts or assists in conducting federal antitrust investigation. Information derived from its efforts may be incorporated in Antitrust Division files and, as such, revealed under §4F(b). However, raw FBI investigative reports will not be disclosed as a matter of course under §4F(b) unless the FBI allows disclosure."[16] Department of Justice Antitrust Division Manual, p. VII-15.

This Court should also be aware of the fact that the Climatemp criminal case resulted in a trial which covered over four weeks of trial and over 2,800 pages of testimony.[17] Ten co-defendant witnesses testified and their memories were refreshed by use of their grand jury testimony. (See transcript filed in 78 CR 388) Notwithstanding this wealth of information, not a single deposition in any of the Climatemp civil cases has been taken. Not one single effort has been made by the State of Illinois to determine whether or not the tetsimony given during the trial is somehow inadequate. This is, of course, part of the reason that the District Court found that the State had not shown a need with sufficient particularity. In fact, it can be argued that the State's lack of diligence in pursuing discovery in this case has created an otherwise unnecessary controversy for the Seventh Circuit, and now this court, to adjudicate.

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[16] Evidently the F.B.I. is also given some discretion not afforded the district courts.

[17] This directly contrasts the situations in *United States* v. *Colonial Chevrolet*, 629 F.2d 943 (4th Cir. 1980) *cert. den.* 450 U.S. 913 (1981) and *United States* v. *B.F. Goodrich*, 619 F.2d 798 (9th Cir. 1980). In the former all the defendants pleaded nolo contendere, and in the latter there was no indictment returned.

The only point of these observations is that in any investigation and/or the preparation of any lawsuit there exists a number of alternative methods of acquiring and developing information. Whether or not the government chooses to use the grand jury as its sole investigative tool and whether the government creates only 19 pieces of paper exclusive of grand jury transcripts and documents is not indicative of Congress' intent.

## E. THE HART-SCOTT-RODINO ACT IS NOT RENDERED MEANINGLESS OR SUPERFLUOUS BY THE EXISTING CASE LAW REGARDING GRAND JURY SECRECY.

Throughout the State of Illinois Briefs, as well as the Brief for the United States, it is suggested that the Hart-Scott-Rodino Act generally, and 4F(b) specifically, are meaningless and superfluous absent automatic disclosure of grand jury materials. Earlier arguments have dealt with those suggestions as they relate to Section 4F(b) specifically. With regard to the Hart-Scott-Rodino Act generally, these arguments are without merit. They ignore what is obvious to anyone who reads the statute and its legislative history.

By authorizing parens patriae actions, Congress attempted to provide a statutory solution to some of the myriad technical problems and obstacles which consumer antitrust suits have confronted in the courts. Large consumer classes predicated upon small individual claims had presented insurmountable problems of manageability in the conduct of the litigation. H.Rep. No. 499, 94th Cong., 1st Sess. 6 (1975) reprinted in [1976] U.S. Code Cong. & Adm. News, at 2576. Prior to enactment of the Hart-Scott-Rodino Act, the states were not authorized to maintain parens patriae actions for their citizens who had

been injured by antitrust violations. *California* v. *Frito Lay*, 474 F.2d 774 (9th Cir.) *cert. denied* 412 U.S. 908 (1973). The Ninth Circuit in *Frito Lay* felt itself unauthorized to sanction a parens patriae action, stating:

> "If the State is to be empowered to act in the fashion here sought *we feel that authority must come not through judicial improvisation but by legislation* and rule making, where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems posed by one's assertion of power to deal with another's property and to commit him to actions taken in his behalf." (emphasis added) *California* v. *Frito Lay*, 474 F.2d 774, 777 (9th Cir.) *cert. denied* 412 U.S. 908 (1973).

At least partially in response to the judicial invitation by the Ninth Circuit, Congress enacted the Hart-Scott-Rodino Act. The thrust of the legislation was to overturn *Frito Lay* by allowing State Attorneys General to act as consumer advocates in the enforcement process, while at the same time avoiding the problems of manageability. H.Rep. No. 499, 94th Cong., 1st Sess. 8 (1975), reprinted in [1976] U.S. Code Cong. & Adm. News, at 2578. The problems which were directly addressed by the Act's draftsman were 1) the difficulty of gaining class certification under Rule 23 of the Federal Rules of Civil Procedure; 2) the difficulty of managing such an action once a class has been certified; and 3) the difficulty of assessing and distributing damages. H.Rep. No. 499, 94th Cong., 1st Sess. 6-8, 13-15 (1975) reprinted in [1976] United States Code Congress & Adm. News, 2576-2578, 2583-2585.

The suggestion in the State of Illinois Brief that these significant changes are somehow unimportant without the State's automatic access to grand jury materials is specious. Somehow, the State of Illinois has attempted to

position itself as being unable to obtain the grand jury transcripts and documents and thereby attempt to depreciate the significance of this legislation. First, one need not be an expert in antitrust law to understand and appreciate the fundamental changes which the Hart-Scott-Rodino Act embodied. Those changes and their effect were explicitly discussed by the Congressional witnesses and the Congress. Secondly, the State has every right to petition the court for the grand jury transcripts and obtain them upon a showing of compelling and particular need. Indeed, the District Court's opinion suggested this. (Pet. App. 38a-39a, citing *Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. 211 (1979)). In fact, the District Court made the observation that the plaintiffs had done little more than file a complaint and then "seek an all encompassing, unparticularized general type of full disclosure which by the very nature of the request would defeat the spirit and rule of *Procter & Gamble* and *Douglas Oil*". (Pet. App. 38a)

The State also attempts to suggest that the rulings of the courts below relegate them to the same status as a private litigant. This is not so. Whatever materials may be obtained by a private litigant, the Hart-Scott-Rodino Act provides a formal statutory method by which the State Attorney General is entitled as a matter of *right* to the "investigative files and other materials" of the Antitrust Division. This is not the case for a private litigant. Whatever informal cooperation existed between the State Attorneys General and the Antitrust Division prior to Hart-Scott-Rodino, the fact is that the Hart-Scott-Rodino Act makes that cooperation by the Attorney General of the United States *mandatory*. That cooperation and the creation of parens patriae law suits cannot now be termed as inconsequential or meaningless. The

fact is that numerous witnesses appearing before Congress advocated implication of this statutory scheme. In doing so, no mention was made of the elimination of the "particularized need" standard. Hearings on S1284 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on Judiciary, 94th Cong., 1st. Sess. 275 (1975). The testimony was limited to a request to Congress to formalize that cooperation by mandating the Antitrust Division to turn over its investigative materials. There was no testimony that the "particularized need" standard was over-bearing, needed changing, or hindered the states' enforcement of the antitrust laws. Nor was there any testimony that a showing of need would jeopardize the "parens patriae" law suits.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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# Respondent's Brief

# 3

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ALEXANDER L. STEVAS,
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81-1114

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

**STATE OF ILLINOIS,**

*Petitioner,*

v.

**ABBOTT & ASSOCIATES, INC., et. al.,**

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR UNDISCLOSED RESPONDENTS

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La Salle Street Press — Chicago Printed in U.S.A.

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No. 81-1114

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

**STATE OF ILLINOIS,**

*Petitioner,*

v.

**ABBOTT & ASSOCIATES, INC., et. al.,**

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR UNDISCLOSED RESPONDENTS

### QUESTIONS PRESENTED

### STATEMENT OF THE CASE

Undisclosed Respondents adopt the Questions Presented and the Statement of the Case as set forth in the Joint Brief for Eighty-Six Respondents ("Joint Brief"), but supplement the Statement of the Case as follows:

This Court has ruled (J.A. 15), as have the courts below, that the identity of the Undisclosed Respondents shall be held *in camera.*

Undisclosed Respondents are an individual and a corporation, the individual's employer. The individual testified before the Grand Jury and the corporation submitted docu-

mentary evidence to the Grand Jury. Neither was indicted and neither has been named as a defendant in the pending civil suits. The individual was not called to testify in the criminal trials and no evidence from the corporation was introduced at the criminal trials.

## SUMMARY OF ARGUMENT

The historic, and still viable, purpose of the Grand Jury is to protect the "innocent". "Innocent" includes not only the accused but also those called to give evidence to the Grand Jury. In the absence of explicit language in Section 4F(b), there is no justification for applying it to permit a state attorney general to have access to Grand Jury materials "on request". Even Petitioner, the United States and *Amicus Curiae* recognize this and that there are court supervised restraints on disclosure. Thus the heretofore existing limitations on disclosure of Grand Jury materials are unchanged and the pre-4F(b) requirements for disclosure remain in effect.

## ARGUMENT

### SECTION 4F(b) SHOULD NOT BE INTERPRETED TO DESTROY THE HISTORIC PROTECTION OF INNOCENT PARTIES BY ALLOWING FREE ACCESS TO GRAND JURY MATERIALS WITHOUT AN EXPLICIT STATEMENT BY CONGRESS MANDATING THAT SWEEPING TRADITION-REVERSING RESULT.

The legislative and judicial history of Section 4F(b) have been ably and thoroughly briefed in the Joint Brief. Undisclosed Respondents expressly adopt the Joint Brief and the arguments therein. The Argument herein supplements the Joint Brief and is applicable equally to all other parties who gave evidence before the Grand Jury but were neither indicted nor named as defendants in the pending civil suits.

In the turmoil of enthusiastic advocacy, and the understandable—but inappropriate—desire of the State to minimize its investigative and case developing effort, a basic truth has been swept aside in a most cavalier manner. The historic purpose of the Grand Jury is to protect—not persecute—the innocent.

*Douglas Oil Co.* v. *Petrol Stops Northwest*
414 U.S. 211, 218, 219 nn 9, 10 (1979)

*United States* v. *Calandra*
414 U.S. 338, 343-345 (1974)

*Matter of Walsh*
623 F.2d 489, 492 (7th Cir. 1980)

*In Re Perlin*
589 F.2d 260, 264 (7th Cir. 1978)

For this reason, protection of secrecy of the Grand Jury proceedings is paramount.

See Comment, *The Rights of a Witness Before a Grand Jury,* 1967 Duke L.J. 97, 99-101, which states:

> "At its inception, the grand jury found its primary *raison d'etre* in fulfilling its role as accuser. Later, however, with the development of the petit jury and the adoption of the accusatorial criminal trial the grand jury's most important function became the task of standing 'steadfast between the crown and the people in the defense of the liberty of the citizen . . .' * * * Considered in the light of its history in American law, the more important of the grand jury's two roles would appear to be its protective function. In addition to the fact that, at the time the institution was enshrined in the Constitution, English law stressed the protective feature, the placement of the grand jury guarantee in our Bill of Rights as a restraint upon governmental prerogative—accompanied by the guarantees against self-incrimination, double jeopardy and deprivation of due process—convincingly indicates the dominant character of the protective role."

Providers of evidence to the Grand Jury are not entitled to counsel, appear before the Grand Jury unprotected from the Attorney General's onslaught, have no right to be confronted by evidence or testimony given by others, cannot object concerning the relevancy or competency of inquiry, are not protected against hearsay or by any of the rules of evidence applicable to a trial, suffer the utmost invasion of privacy and the burden and embarrassment of the Grand Jury subpoena and proceedings.

The "innocent" in the context of the preservation of Grand Jury secrecy, includes not only those who are actual or potential "targets" of the investigation--not only the accused or suspected. Others are called to give evidence for use against targets, accused and suspected. The very fact that they have given evidence—voluntarily or involuntarily —must be protected as well as the evidence given by them or against them. The exposures to retaliation, approbation, ridicule, embarrassment, inference of possible guilt and disruption of personal and business relationships have all been recognized as dangers against which protection must be given. This protection can be afforded only by preserving Grand Jury secrecy.

*United States* v. *Briggs*
514 F.2d 794, 803, 804 (5th Cir. 1975)

Furthermore, the efficacy of the Grand Jury itself would be adversely affected by breach of secrecy. Fear of disclosure unquestionably will have a chilling effect on the cooperation of witnesses.

*Douglas Oil Co.* v. *Petrol Stops Northwest*
411 U.S. 211, 218, 219 (1979)

*Pittsburgh Plate Glass Co.* v. *United States*
360 U.S. 395, 400 (1959)

*United States* v. *Procter & Gamble Co.*
356 U.S. 677, 681, 682 (1958)

*United States* v. *Johnson*
319 U.S. 503, 513 (1943)

In *Procter & Gamble Co.*, the Court said (pages 361, 362):

> "* * * we start with a long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts. (citations omitted) The reasons are varied. One is to encourage all witnesses to step forward and testify freely without fear of retaliation. The witnesses in antitrust suits may be employees or even officers of potential defendants, or their customers, their competitiors, their suppliers. The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow."

This Court has recognized (as have the courts below) the importance of protecting providers of Grand Jury information by its order (J.A. 15) that the identity of Undisclosed Respondents be held *in camera*.

In testifying before the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary concerning H.R. 94, the Grand Jury Act of 1977, Mr. Benjamin R. Civiletti, then Assistant Attorney General, Criminal Division, in opposing the proposal to permit witnesses to have counsel when appearing before the Grand Jury, expressed great concern about breach of the Grand Jury secrecy. Some of his pertinent comments were as follows:

> "This proposal provides further opportunity for breach of grand jury secrecy which everyone abhors."
>
> * * *
>
> "* * * the individual witness may possess relevant information and be willing to cooperate with the investigation. Understandably, however, he may desire that his cooperation not become known to his employer, fellow union members, or others whom he knows his attorney represents or with whom the attorney has been associated. The problem should not be underestimated."

* * *

> "Under the present system, in which counsel remains outside the grand jury room, the witness, while able to disclose as much of his testimony as he chooses, retains the important right to conceal the extent of his cooperation or the fact that he was required to supply evidence against others. Were the practice changed to admit counsel into the grand jury room, the witness in such a situation might feel less free to testify."

An additional concern is also pointed up by Mr. Civiletti's remarks. He was concerned about a disclosure by the witness' own attorney. Should we be any less concerned about a disclosure by the state attorney general—deliberate or inadvertent or by implication from his actions—to counsel for other plaintiffs who, without question, are not entitled to any benefits from 4F(b).

It is clear even from the briefs of Petitioner, the United States and *Amicus Curiae* that Section 4F(b) does not explicitly allow the states free access to the Grand Jury materials without the showing required of others. These briefs recognize that 4F(b) is not authority to the Attorney General to, without anything further, disclose Grand Jury matter to a state attorney general on request—which is what 4F(b) would have to mean if Petitioner's arguments are valid that Grand Jury matters are "investigative files or other materials", or that disclosure may be made without showing a particularized need. They all admit that the disclosure cannot be made while a criminal prosecution is pending—a limitation not set out in 4F(b). Further, they admit that the disclosure can be made only on application to the Court and that the Court can enter a protective order —limitations not set out in 4F(b).

Therefore, their entire 4F(b) argument fails and one most come back to the *Douglas* rule that application must be made to the District Court and a particularized need must be shown. In the absence of such a showing, how can

the District Court determine if and to what extent a protective order is necessary? Any protective request by the parties affected by disclosure can only be properly evaluated in the light of the need shown by the parties requesting disclosure.

Petitioner is asking this Court to do what Congress expressly did not do—that is, abrogate 6(e) for the states' attorneys general. Or, put another way, to add another exception to 6(e). Had Congress wished to do so, it was so singularly easy to do so explicitly that its failure to do so can only mean that it did not intend to do so. Congress having failed to make this radical change in the law for which Petitioner contends, the Court should not read this major policy change into the statute.

*Texas Industries, Inc.* v. *Radcliff Materials, Inc.*
451 U.S. 630 (1981)

In a similar context, Chief Justice Burger, writing for a unanimous court in *Texas Industries,* made the following comments (p. 639):

> "There is no allegation that the antitrust laws expressly establish a right of action for contribution. Nothing in these statutes refers to contribution, and if such a right exists it must be by implication."
>
> • • •
>
> "The absence of any reference to contribution in the legislative history or of any possibility that Congress was concerned with softening the blow on joint wrongdoers in this setting makes examination of other factors unnecessary."

Just as in *Texas Industries,* there is nothing in the statute or legislative history of Section 4F(b) to indicate that Congress intended to abrogate the historic protection afforded by maintaining the secrecy of the Grand Jury.

To evade the clear meaning of the 4F(b) limitation "to the extent permitted by law", Petitioner argues that disclosure of the Grand Jury proceedings is not "specifically prohibited". The explicit language of Rule 6(e)(2) disproves this; it provides:

> "(2) General Rule of Secrecy—A grand juror • • • an attorney for the government • • • *shall not disclose matters* occurring before the Grand Jury, except as otherwise provided for in this rule." (Italics added)

The Rule itself considers that it effects a specific prohibition; 6(e)(3)(C)(ii) is expressly an "exception" to a "prohibition".

The exception to the prohibition provided in 6(e)(3)(A)(i), for "an attorney for the government"—thus the Attorney General and his assistants—is only "for use in the performance of such attorney's duty". That duty is stated in 6(e)(3)(A)(ii) to be "to enforce the federal criminal law". It is not to prosecute a civil suit for the benefit of the State of Illinois.

Furthermore, disclosure to non-attorney governmental (U.S.) personnel is permitted under 6(e)(3)(A)(ii) only "to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law."

The fact that the Attorney General chooses to use the Grand Jury as an investigative tool in antitrust cases does not convert the Grand Jury materials to Attorney General material.[1] Perhaps the Attorney General should be criticized for perverting the traditional rule of the Grand Jury from a protection of the innocent to a modern day *auto da fé*.[2]

---

[1] This is borne out by the Antitrust Civil Process Act in which (15 USC § 1313(d)(1)) it is provided with reference to materials used by a Department of Justice attorney that: "Upon the completion of any such • • • grand jury • • • such attorney shall return to the custodian any such material, answers or transcripts

## CONCLUSION

For the reasons stated above and in the Joint Brief, Undisclosed Respondents respectfully request this Court to affirm the holding of the Court of Appeals for the Seventh Circuit.

August 6, 1982

Respectfully submitted,

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---

*which have not passed into the control of such * * * grand jury * * * through the introduction thereof into the record * * * "* (italics added).

[2] This is particularly true in the light of the broadened and strengthened investigative tools provided to the Attorney General under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the Antitrust Procedural Improvements Act of 1980, which amended the Antitrust Civil Process Act (15 USC §§ 1311-1314). Though labeled a civil investigation process, the results of the investigation are available for grand jury procedures, 15 USC § 1313(d)(1). See American Bar Association, *Antitrust Law Developments, Third Supplement 1974-1980* (1981) p. 127 for a discussion of the increased use by the Attorney General of civil investigative demands in preference to grand jury proceedings.

# Intervenor's Brief

Office - Supreme Court, U.S.
FILED
AUG 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1114

# In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ILLINOIS,

*Petitioner,*

vs.

ABBOTT & ASSOCIATES, INC., et al.,

*Respondents.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR THE INTERVENORS-RESPONDENTS INLAND HEATING & AIR CONDITIONING COMPANY AND LAWRENCE KRUEGER

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## QUESTION PRESENTED

Intervenors-Respondents Inland Heating & Air Conditioning Company and Lawrence Krueger disagree with the statements by the State of Illinois and the United States of the questions presented in this case. There is only one question presented:

> WHETHER SECTION 4F(b) OF THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT DIRECTS THE DISTRICT COURTS TO DISCLOSE GRAND JURY MATERIALS RELATING TO ANTITRUST INVESTIGATIONS TO STATE ATTORNEYS GENERAL WITHOUT THE TRADITIONAL SHOWING OF COMPELLING AND PARTICULARIZED NEED.

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# BRIEF FOR INTERVENORS-RESPONDENTS INLAND HEATING & AIR CONDITIONING COMPANY AND LAWRENCE KRUEGER

## STATUTE AND RULE INVOLVED

Section 4F of the Hart-Scott-Rodino Antitrust Improvements Act of

1976, Title III, 15 U.S.C. §15f, provides:

> (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.
>
> (b) To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.

Relevant portions of Rule 6, Federal Rules of Criminal Procedure, provide:

Rule 6. The Grand Jury.

(a) Summoning Grand Juries. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(b) Objections to Grand Jury and to Grand Jurors. . . .

(c) Foreman and Deputy Foreman. The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking evidence, a stenographer or operator of a recording device may be present while the

grand jury is in session, but no person other than the jurors may be present whil the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. . . .

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph 3(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) . . .

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made --

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(4) Sealed Indictments.

. . . .

(f) Finding and Return of Indictment. . . .

> (g) Discharge and Excuse. A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. . . .

## STATEMENT OF THE CASE

To avoid unnecessary repetition of the same facts presented by the other briefs, Intervenors-Respondents Inland Heating & Air Conditioning Company ("Inland")* and Lawrence Krueger ("Krueger") present an abbreviated statement of the case, focusing on their interests in the case. Inland produced documents and Krueger gave testimony before the August, 1977, Grand Jury of the Northern District of Illinois (the "Grand Jury") in connection with the Grand Jury's investigation of alleged antitrust violations in the piping and

---

*Pursuant to Supreme Court Rule 28(1), Inland states that it has no parent companies, subsidiaries or affiliates.

sheet metal industries. Inland produced documents relating to its bids in these industries in response to a subpoena duces tecum issued by the District Court. Krueger, who was the Vice-President and Treasurer of Inland and a salesman for the company, testified in response to a subpoena issued by the District Court and pursuant to a grant of use immunity.

Although the Grand Jury returned indictments alleging price fixing conspiracies in the sheet metal and piping industries, neither Inland and Krueger was indicted. Neither was named by the United States as an unindicted coconspirator.

In the instant case, the State of Illinois (the "State") seeks wholesale disclosure of all documents and

testimony received by the Grand Jury for use in the State's civil antitrust actions entitled State of Illinois v. Climatemp, Inc., et al., 79 C 4898 (N.D. Ill.), and State of Illinois v. Borg, Inc., et al., 79 C 5253 (N.D. Ill.). The State's complaints track verbatim the criminal indictments issued by the Grand Jury. Forty-three defendants are named in each case.

Neither Inland nor Krueger is a defendant in either civil case.

In the Court below, the State sought disclosure of the grand jury materials on two grounds: first, that it was entitled by reason of Section 4F(b) to disclosure of the materials without having to make the traditional showing of particularized need; and second, that particularized need existed

for the materials. In its claim that particularized need existed, the State was joined by other plaintiffs who had filed civil actions based on the same alleged antitrust conspiracies (the "Private Plaintiffs").

In support of their claim that particularized need existed for the grand jury materials, the State and the Private Plaintiffs asserted that widespread disclosure had been made to the defendants in the preceding criminal cases, an assertion that the State continues to make in this Court. Brief for Petitioner at 4, 8, 31. This assertion is untrue. Krueger's testimony and Inland's documents, for example, were made available for inspection by counsel for the defendants in United States v. Borg, Inc., 79 CR 67 (N.D. Ill.), and United States v. S. J. Reynolds Co.,

Inc., 79 CR 66 (N.D. Ill). The sign-in logs for document and transcript inspection in Borg, however, disclose inspection by attorneys for only two individual defendants and one corporate defendant. (Memorandum of the United States in Response to Petitions by the State of Illinois and Certain Treble Damage Plaintiffs for Disclosure of Grand Jury Material, Exhibits E & H, filed in the District Court on May 19, 1980) The United States did not report any document or transcript inspection in Reynolds. The District Court, holding that the State and the Private Plaintiffs had not established particularized need for the grand jury materials, found no evidence that there had been unfair access to the materials by the defendants in the criminal cases. (Pet. App. 36a)

Inland and Krueger intervened in the District Court and objected to the requested disclosure of grand jury materials. They pointed out that the doctrine of grand jury secrecy protects inter alia the interests of the innocent accused and that the need for this protection continues without abatement after termination of the criminal litigation. They disputed the State's claim that Section 4F(b) has modified the doctrine of grand jury secrecy.

The District Court rejected the claim by the State and the Private Plaintiffs that particularized need existed for the grand jury materials and rejected the State's claim that Section 4F(b) eliminated the requirement that it show particularized need. Neither the State nor the Private Plaintiffs appealed from the District Court's

finding that particularized need was not established. The only issue presented on the appeal to the Seventh Circuit was whether the State is relieved of the burden of establishing particularized need by Section 4F(b), and the Court of Appeals held that it was not. The same question is presented to this Court.

## SUMMARY OF ARGUMENT

Section 4F(b) has nothing to do with the disclosure of grand jury materials. Section 4F(b) directs the Attorney General of the United States to make available to state attorneys general, on request, any investigative files or other materials which may be useful in connection with an existing or possible civil antitrust action, to the extent the Attorney General is permitted to do so by law. The Attorney General

has no authority whatsoever to disclose grand jury materials. Grand jury materials are controlled by the district courts and are kept secret in accordance with the common law and Rule 6 of the Federal Rules of Criminal Procedure.

The State and the United States use Section 4F(b) as a pretext to argue, as a matter of policy, that petitions by states for disclosure of grand jury materials should be considered so compelling as to justify routine disclosure after federal criminal proceedings have terminated. They argue that the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Hart-Scott-Rodino Act") embodies a concept that states are superior to private persons when they assume the role of civil antitrust plaintiff and that this superiority places the states beyond the

reach of the traditional "particularized need" standard, which governs disclosure of grand jury materials and maintains their secrecy as a general rule. They also argue that disclosure of grand jury materials is necessary to give states the assistance which Congress contemplated in enacting Section 4F(b), because the Justice Department conducts almost all of its antitrust investigations before the grand jury.

The policy arguments of the State and the United States have no merit. Maintenance of grand jury secrecy after federal criminal proceedings have terminated is necessary to protect the innocent and to preserve the vitality of the grand jury as an investigative body. The secrecy of grand jury materials does not depend on how

important a petitioner seeking disclosure of the materials can claim it is under the law. In fact, while the Hart-Scott-Rodino Act does give the states a special and important role in the enforcement of the federal antitrust laws, it is not a role that is superior in importance to the role of private civil antitrust plaintiffs.

In enacting Section 4F(b), Congress did not contemplate the disclosure of grand jury materials. Congress directed the United States Attorney General to provide only as much assistance to the states as he could lawfully provide. Section 4F(b) in its present form can and should provide the states with meaningful assistance in bringing civil antitrust actions. The heretofore unannounced practice of the Justice Department of conducting almost all of

its antitrust investigations before the grand jury does not affect the scope of Section 4F(b). As a matter of policy, this practice should be discouraged. If the Justice Department were to conduct a more extensive preliminary investigation before taking each antitrust case to the grand jury, this action would promote not only the interests of the states as civil antitrust plaintiffs but also the vitality of the grand jury as an independent decision-making body.

The ultimate interest asserted by the State and the United States in seeking routine disclosure of grand jury materials to the states is the saving of taxpayers' money. This interest does not justify withdrawal of the traditional protection which grand jury secrecy provides to the innocent and to the vitality of the grand jury.

Inland and Krueger have an important stake in the continued secrecy of the Grand Jury proceedings, one that is not limited to their interest in preventing disclosure of their own testimony and documents. Inland and Krueger could easily have been called to produce documents and to testify to the Grand Jury because someone accused them or mentioned them unfavorably in earlier testimony. Irreparable injury can be caused to the reputations of innocent persons by the disclosure of grand jury testimony. The hazard of such injury arises from the fact that grand jury witnesses may be asked to relate hearsay, vague recollections, speculation and irrelevant matters in the grand jury's search for criminal wrongdoing. The interest of Inland and Krueger in avoiding such injury outweighs all of

the policy arguments raised by the State and the United States.

## ARGUMENT

### I. Secrecy is an essential attribute of grand jury proceedings.

Before turning to the terms of Section 4F(b) and its legislative history, it is worth reviewing briefly the doctrine of grand jury secrecy to put into perspective the remarkable innovations which the State and the United States attribute to this provision.

Secrecy has for centuries been considered an essential attribute of grand jury proceedings. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 n.9 (1979). The grand jury has two important functions. First, it serves as a "primary security to the innocent"

against hasty, malicious or oppressive prosecution. Wood v. Georgia, 370 U.S. 375, 390 (1962). Its mission is to "clear the innocent" as much as it is to bring to trial those who may be guilty. United States v. Dionisio, 410 U.S. 1, 16-17 (1973). Second, the grand jury plays an important traditional role as an investigative body. United States v. Calandra, 414 U.S. 338, 343 (1974). The grand jury is given wide latitude to inquire into possible violations of criminal law, and its investigations, which may be led by tips, rumors, evidence proffered by the prosecutor or the personal knowledge of the grand jurors, may properly continue until every available clue has been run down and all witnesses have been examined to determine whether a crime as been committed. Branzburg v. Hayes, 408 U.S.

665, 701-02 (1972); United States v. Calandra, supra.

Secrecy in part serves the immediate criminal enforcement efforts of the United States in any case in which a federal grand jury is convened. Thus, secrecy protects grand jurors from being influenced by potential defendants, serves to prevent the escape of individuals who may be indicted, and prevents tampering with potential trial witnesses after indictments have been returned. Douglas Oil Co. v. Petrol Stops Northwest, supra, 441 U.S. at 219 n.10.

Secrecy, however, also serves the broader purposes of the grand jury. Secrecy thus serves to protect the innocent. The grand jury first acquired

its reputation as a protector of citizens against unwarranted accusations in the late 17th Century, after grand juries in London refused to return indictments of high treason against Stephen College and the Earl of Shaftesbury notwithstanding great pressure from Charles II. R. Younger, The People's Panel 20-22 (1963); G. Edwards, The Grand Jury at 28-30 (1906) ("Edwards"). At this time, the secrecy of grand jury proceedings was well-established as "the ancient custom of the kingdom," with the grand jurors examining witnesses in private and swearing to keep their deliberations secret. Earl of Shaftesbury's Trial, 8 How. St. Tr. 759, 771-74 (1681), quoted at 8 Wigmore, Evidence §2360 at 728-29 (McNaughton rev. 1961); Edwards, supra at 27-28. In the College and Earl of

Shaftesbury cases, the presiding justice in each case broke with tradition by compelling the grand jury to hear the evidence in open court, but he thereafter permitted the grand jury to examine the witnesses in private. Although it was said of the witnesses testifying in public that "never men swore more firmly in court than they did," after each private examination the grand jury refused to indict the accused. Edwards, supra at 28-30.

The Earl of Shaftesbury's case in a sense foreshadows the instant case, in which the State relies heavily on the willingness of the United States to disclose the grand jury materials in question, notwithstanding the ordinary interest of the United States in maintaining the secrecy of federal grand

jury proceedings. When the king's counsel moved that the evidence be heard in open court, the grand jurors objected, arguing that this procedure might be prejudicial to the king. The presiding justice rejected this contention, stating:

> [I]t will be no prejudice to the king to have the evidence heard openly in court; or else the king would never desire it.

The foreman of the grand jurors then said:

> My lord, the gentlemen of the jury desire that it may be recorded, that we insisted upon it as our right . . . .

Earl of Shaftesbury's Trial, supra, 8 How. St. Tr. at 774. Similarly, the willingness of the United States to disclose the grand jury materials in the

instant case does not answer the question whether secrecy should be maintained. "[E]ven when the executive branch loses interest in continued secrecy, other societal interests in the integrity of [grand jury secrecy] remain." United States v. RMI Co., 599 F.2d 1183, 1190 (3d Cir. 1979).

To this day, secrecy serves to protect the grand jury from prosecutorial coercion. Under Rule 6 of the Federal Rules of Criminal Procedure, which governs the secrecy of grand jury proceedings, no person other than the jurors may be present while the grand jury is deliberating or voting, Rule 6(d), and the grand jurors may not disclose their deliberations or votes to attorneys for the government, Rule 6(e)(2),(3)(A)(i).

Just as importantly, secrecy protects the innocent accused from defamatory injury, where testimony about them does not lead to indictment. Douglas Oil Co. v. Petrol Stops Northwest, supra, 441 U.S. at 219. Irreparable injury may be caused to the reputations of innocent persons by the disclosure of grand jury testimony. In re Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24, 33 (2d Cir. 1981), cert. petition filed, 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595). The hazard of such injury arises from the fact that grand jury witnesses may be asked to relate hearsay, vague recollections, speculation and irrelevant matters in the grand jury's search for criminal wrongdoing. United States v. Calandra, supra, 414

U.S. at 345; Costello v. United States, 350 U.S. 359 (1956).

Grand jury witnesses are not represented by counsel, and rules of evidence are inapplicable. United States v. Mandujano, 425 U.S. 564, 581 (1976); United States v. Calandra, supra, 414 U.S. at 343. Those about whom grand jury witnesses testify have no right to confrontation or cross-examination and no opportunity to introduce evidence in rebuttal. United States v. Leverage Funding Systems, Inc., 637 F.2d 645, 648 (9th Cir. 1980); United States v. Levinson, 405 F.2d 971 (6th Cir. 1968). Secrecy thus protects

> the interest of a witness against the disclosure of testimony of others which he has had no opportunity to cross-examine or rebut, or of his own testimony on matters which may be irrelevant . . . .

In re Biaggi, 478 F.2d 489, 491 (2d Cir. 1973). Protection of reputations is one of the principal reasons why grand jurors are sworn to secrecy. Board of Education v. Admiral Heating and Ventilation, Inc., 513 F. Supp. 600, 604 (N.D. Ill. 1981); United States Department of Justice, Antitrust Grand Jury Practice Manual at 23 n.16a & App. 44 p.4 (CCH ed. 1975) ("Antitrust Grand Jury Practice Manual").

This Court also has noted that the effectiveness of the grand jury as an investigative body would be limited if witnesses knew that their testimony would later be disclosed. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959). This concern is especially important in antitrust cases, where witnesses may be employees, officers, customers, competitors or

suppliers of potential defendants, and the witnesses may have reason to fear business reprisal. United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958). See United States v. Atlantic Container Line, Ltd., 511 F. Supp. 115, 116 (D.D.C. 1981). Such witnesses would be reluctant to appear and to testify fully if secrecy were not strictly preserved as a general rule. Douglas Oil Co. v. Petrol Stops Northwest, supra, 441 U.S. at 222.

With this interest in mind, the lower federal courts have emphasized the importance of maintaining public confidence in the secrecy of grand jury proceedings. See In re Grand Jury Investigation of Cuisinarts, Inc., supra, 665 F.2d at 32-33 ("witnesses before the grand jury, because they are aware of the traditional secrecy enveloping these

proceedings, have reason to assume that their presence and their testimony will not be revealed"); Texas v. United States Steel Corp., 546 F.2d 626, 629 (5th Cir. 1977) (the grand jury must be "a sanctuary . . . where a witness may testify, free and unfettered by fear of retaliation"); United States v. Colonial Chevrolet Corp., 1979-2 Trade Cases (CCH) ¶62,835 at 78,819 (E.D. Va. 1979), rev'd, 629 F.2d 943 (4th Cir. 1980) (the court should not "break faith" with those who have testified under the understanding that their testimony would be secret).

The doctrine of grand jury secrecy is embodied in Rule 6 of the Federal Rules of Criminal Procedure. Rule 6(e) generally prohibits disclosure of "matters occurring before the grand

jury" and provides that a knowing violation of the rule may be punished as contempt of court. Rule 6(e)(2). To this general rule, there are several limited exceptions, including an authorization for judicial disclosure of grand jury materials to litigants. Rule 6(e)(3)(C)(i).

To preserve the secrecy of grand jury proceedings as a general rule under this exception, this Court has required any litigant which seeks grand jury materials to establish that he has a compelling and "particularized" need for the materials. United States v. Procter & Gamble Co., supra, 356 U.S. at 683. As explained in Douglas Oil v. Petrol Stops Northwest, supra, 441 U.S. at 222, the "particularized need" standard requires that the litigant show (1) that the materials he seeks is

needed to avoid a possible injustice in a judicial proceeding, (2) that the need for disclosure is greater than the need for continued secrecy, and (3) that the request is structured to cover only material so needed.

It is well-established that the most tempting reason to a civil antitrust plaintiff to seek grand jury materials, namely the great savings in time and money which the material would provide in discovery, is insufficient as a basis for obtaining grand jury testimony. Id. at 229; United States v. Procter & Gamble Co., supra. The particularized need standard has consistently been applied when states and other public entities have sought grand jury materials, as it has when private entities have sought such materials.

See, e.g., In re Grand Jury Investigation of Cuisinarts, Inc., supra, 665 F.2d at 36; Texas v. United States Steel Corporation, 546 F.2d 626 (5th Cir. 1977); In re Holovachka, 317 F.2d 834 (7th Cir. 1963); Minnesota v. United States Steel Corporation, 44 F.R.D. 559 (D. Minn. 1968).

II. Section 4F(b) does not authorize disclosure of grand jury materials.

The State claims that Section 4F(b) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 relieves the states as civil antitrust plaintiffs of the necessity of showing particularized need to obtain relevant federal grand jury materials. This claim is invalid. Section 4F(b) has nothing to do with the disclosure of grand jury materials.

Section 4F, 15 U.S.C. §15f, reads as follows:

> (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.
>
> (b) To assist a State attorney general in evaluating the notice, or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.

In short, Section 4F(b) directs the Attorney General of the United States to cooperate with state attorneys general in antitrust matters by disclosing

relevant investigative materials to them on request, to the extent the Attorney General is permitted to do so by law.

The first aspect of this provision worth noting is that it is not directed to the district courts, which have exclusive authority under Rule 6 of the Federal Rule of Criminal Procedure to authorize disclosure of grand jury materials. The Attorney General of the United States has no authority whatsoever to disclose grand jury materials to litigants and would be subject to penalties for contempt of court if he undertook to do so without judicial authorization.

The State and the United States argue that grand jury materials fall within the general term "investigative files or other materials," but this

argument misses the point. The Attorney General is permitted by Section 4F(b) to disclose only those materials which he is allowed to disclose by law. By limiting the Attorney General's mandate to disclose investigative materials "to the extent permitted by law," Congress incorporated and reaffirmed the prior law forbidding disclosure of grand jury materials without a showing of particularized need. It did not express or imply any change in that law.

The State and the United States acknowledge that the "law" referred to in Section 4F(b) includes Rule 6(e), but they argue or imply that it does not include the common law tradition of grand jury secrecy and the decisions of this Court enforcing the strong policies in favor of secrecy through the particularized need standard. This Court has

recognized that new legislative policies must, where possible, be interwoven with the inherited body of common-law principles. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 392 (1970). Statutes are read "with a presumption favoring the retention of long-established and familiar principles . . . ." Isbrandtsen Co., Inc. v. Johnson, 343 U.S. 779, 783 (1952). A statute is "not to be construed as making any innovation upon the common law which it does not fairly express." Robert C. Herd & Co., Inc. v. Krawill Machinery Corp., 359 U.S. 297, 304-05 (1959), quoting Shaw v. Railroad Co., 101 U.S. 557, 565 (1879). Where, as here, Congress has expressly reaffirmed the limitations of existing law, the argument that it meant to change that law is nonsensical.

Two other aspects of Section 4F(b) demonstrate that it has nothing to do with disclosure of grand jury materials. First, Congress directed the Attorney General to make investigative materials available to state attorneys general "upon request." Both the United States and the State have acknowledged that grand jury materials cannot be disclosed by the Attorney General upon request. In response to the request by the State in this case, the Attorney General stated:

> [W]e are unable to supply you with other materials at this time, since those materials are subject to the requirements of grand jury secrecy set forth in Rule 6(e) of the Federal Rules of Criminal Procedure and, consequently, may not be disclosed absent a court order.

Joint App. at 9. When Congress directed the Attorney General to make investigative materials available to state attorneys general "upon request," it clearly did not intend that he disclose grand jury materials.

Second, Section 4F(b) calls for disclosure by the Attorney General of any investigative materials which "are or may be relevant or material to the actual or potential cause of action." This language is not, as the State claims, a standard for judicial review of a proposed disclosure of grand jury materials. Brief for Petitioner at 43. The words are not meaningful as a judicially applicable limitation on disclosure. They were written, not with judicial review in mind, but as a command to the Attorney General to provide, to the extent permitted by law,

any investigative materials which could be useful to a state attorney general in connection with an existing or possible civil antitrust action.

In its argument that "investigative files and other materials" includes grand jury materials, the State relies on a basic misconception about the role of the grand jury. The State in essence argues that the investigative files of the executive branch necessarily include grand jury materials, because the grand jury is an "investigative and prosecutorial arm of the executive branch." Brief for Petitioner at 13-15. The grand jury, however, is not merely an investigative arm of the executive branch. Its role in protecting citizens from prosecutorial mischief is just as important as its role in investigating mischief by

citizens. See United States v. Dionisio, supra, 410 U.S. at 16-17.

As the State itself elsewhere notes, Brief for Petitioner at 19, the grand jury is "not relegated by the Constitution to a position within any of the three branches of government. 'The federal grand jury is a constitutional fixture in its own right . . . .'" United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir. 1977), quoting Nixon v. Sirica, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973). "Its authority is derived from none of the three basic divisions of our government, but rather from the people themselves." In re April 1956 Term Grand Jury, 239 F.2d 263, 269 (7th Cir. 1956). The grand jury, however, is "in a sense, a part of our court system . . . ." Id. The district court summons the grand jury, appoints the

foreman, and maintains the secrecy of grand jury proceedings. Unauthorized disclosure of grand jury materials is punishable as contempt of court. Rule 6, Fed. R. Crim. P. For these reasons, it is appropriate to refer to grand jury materials as "records of the court," as Justice Whittaker did in United States v. Procter & Gamble Co., 356 U.S. 677, 684-85 (1958) (Whittaker, J., concurring). Grand jury materials certainly are not, as the State claims, "investigative files or other materials" of the executive branch.

## III. The legislative history of Section 4F(b) confirms that it does not apply to grand jury materials.

The legislative history of Section 4F(b) confirms the fact that the provision does not authorize the disclosure of grand jury materials. The

State and the United States rely on the language of the House Report, but this document refutes their argument. The Report states:

> Section 4F(b) requires the U.S. Attorney General to make the Justice Department's investigative files available to the State attorneys general "to the extent permitted by law." This means that the files are to be made available except where specifically prohibited.

H.R. Rep. No. 94-499, Part I, 94th Cong., 2d Sess. 17, reprinted in [1976] U.S. Code Cong. & Ad. News 2572, 2586. The State and the United States ignore the fact that disclosure of grand jury materials by the Attorney General is specifically prohibited, both by Rule 6(e) and by the common law. See Douglas Oil Co. v. Petrol Stops Northwest, supra, 441 U.S. at 218 n.9. At the time

Congress enacted Section 4F(b), Rule 6(e) stated inter alia:

> [An attorney] may disclose matters occurring before the grand jury only when so directed by the court . . . .

18 U.S.C.A. Rule 6(e) at 267 (1975) (emphasis supplied). In 1977, Congress made the prohibition on disclosure of grand jury materials even more explicit:

> [A]n attorney for the government . . . shall not disclose matters occurring before the grand jury, except as otherwise provided in these rules.

18 U.S.C.A. Rule 6(e)(2) at 42 (1982 Pocket Part) (emphasis supplied).

The fact that Section 4F(b) does not apply to grand jury materials was made explicit in the remarks of Senator Abourezk, Senate Floor Manager for the bill, during the final Senate debate:

> The section specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. Under existing law, he cannot turn over materials given in response to a grand jury demand . . . .

122 Cong. Rec. 29160 (1976). Two aspects of this statement are important. First, Senator Abourezk made explicit the legislative understanding that the Attorney General under Section 4F(b) could not disclose grand jury materials. Second, he made clear that the purpose of Section 4F(b) was not in any way to expand the power of the Attorney General to disclose investigative materials. The purpose of the statute instead lay in its command that on request the Attorney General "shall" disclose to state attorneys general those investigative materials which he

formerly had discretion disclose or withhold from disclosure.

## IV. The Fourth and Ninth Circuits Badly Misconstrued Section 4F(b).

The decisions of the Fourth Circuit and the Ninth Circuit in United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980), and United States v. B. F. Goodrich Co., 619 F.2d 798 (9th Cir. 1980), are grievously in error and should be rejected by this Court.

In Goodrich, the Ninth Circuit ignored the significance of the phrase "to the extent permitted by law" in Section 4F(b), dismissed the legislative history as "equivocal," and proceeded to adopt the policy arguments presented by the United States and the party states. In Colonial Chevrolet, the Fourth

Circuit followed a similar course but, in addition, aggressively misconstrued the legislative history of Section 4F(b).

The Fourth Circuit's treatment of the legislative history of Section 4F(b) is worthy of special attention. The Fourth Circuit was not satisfied with the House Report's statement that investigative materials should be disclosed "except where specifically prohibited." The court argued that what Congress really meant was that investigative materials should be disclosed except where "absolutely" prohibited and that, because grand jury secrecy is not an "absolute bar" to disclosure of grand jury materials, Congress meant to allow disclosure of grand jury materials. 629 F.2d at 948. This is a bootstrap argument.

The Fourth Circuit's treatment of Senator Abourezk's comments on the floor of the Senate is equally bad. Instead of treating his comments as a guide, the court treated them as a potential "impediment" and tried to remove the impediment. Id. at 947-48. The court argued that all Senator Abourezk really meant was that the Attorney General could not disclose grand jury materials without a court order and jumped to the conclusion that Section 4F(b) directed the district courts to order such disclosure to state attorneys general without a showing of particularized need. The court simply ignored the fact that Section 4F(b) is addressed only to the Attorney General. Because the provision does not authorize the Attorney General to disclose grand

jury materials, it has no application to grand jury materials.

The Fourth Circuit's treatment of Section 4F(b)'s legislative history betrays an effort to reach a predetermined result. The Ninth Circuit's dismissal of the legislative history as "equivocal" shows the same intent. What really persuaded these courts was the set of policy arguments made by the United States and the states, policy arguments which are nowhere reflected in the terms or legislative history of Section 4F(b).

## V. Reliance by the State and the United States on Section 4F(b) is merely a pretext for their presentation of policy arguments.

It is apparent from a plain reading of Section 4F(b) and an examination of its legislative history that the

provision does not authorize the disclosure of grand jury materials to the states. When one examines closely the result which the State and the United States attribute to this provision, it is apparent that their reliance on Section 4F(b) is nothing more than a pretext for the presentation of policy arguments.

First, the State and the United States argue that Section 4F(b) operates as a timed-release mechanism, eliminating the standard of particularized need as an obstacle to the states only after federal criminal enforcement efforts have been terminated. The United States indeed vigorously asserts that the states must not have free access to grand jury materials while criminal enforcement efforts are pending, because such disclosure would jeopardize those

efforts. Brief for United States at 25-26 & n.19. Section 4F(b), however, makes no distinction based on the pendency of federal criminal proceedings. As noted above, it obligates the Attorney General to disclose investigative materials to the states on request.

The essence of the argument by the State and the United States is that Section 4F(b) selectively overrides only certain policies embodied in the doctrine of grand jury secrecy. Generally, grand jury secrecy protects (1) the criminal enforcement efforts of the United States, (2) the interests of the innocent accused, and (3) the vitality of the grand jury as an investigative body. See Douglas Oil v. Petrol Stops Northwest, supra, 441 U.S. at 219 & n.10. The State and the United States

agree that the necessity of secrecy to protect the criminal enforcement efforts of the United States prevails over the interest of the states in obtaining grand jury materials. They argue, however, that Congress intended to override grand jury secrecy after criminal enforcement efforts have terminated, when only the interests of the innocent accused and the vitality of the grand jury remain at stake. No such distinction is reflected in either the terms or the legislative history of Section 4F(b).

Second, the State and the United States reluctantly acknowledge that the interests of the innocent accused and the vitality of the grand jury need protection after criminal proceedings have terminated, but they argue that Section 4F(b) substitutes

protective orders for nondisclosure as the means of protecting these interests. Brief for Petitioner at 43; Brief for United States at 28. Section 4F(b), however, makes no reference to protective orders. The argument that Section 4F(b) directs the courts to disclose grand jury materials to the states under protective orders is not a reading of legislative intent but is wishful thinking.

Finally, the State acknowledges that opponents of disclosure may, under "the relevant circumstances of the case," show that disclosure to the state should not be permitted. Brief for Petitioner at 43. In essence, the State argues that Section 4F(b) shifts the burden of justification from the states, which otherwise must present compelling

reasons for disclosure under the particularized need standard, to opponents of disclosure, which would have to offer particular reasons for maintaining secrecy under the proposed standard. The suggestion that Congress had this modification in mind when it enacted Section 4F(b) is fanciful.

## VI. Disclosure of grand jury materials to the states without a showing of particularized need is unjustified and wrong as a matter of policy.

It should not be necessary in this case to proceed beyond a demonstration that Section 4F(b) has no application to petitions for disclosure of grand jury materials. The issue presented, after all, is whether Section 4F(b) relieves the states of the burden of showing particularized need. Because the Fourth Circuit and the Ninth

Circuit, however, appear to have been moved by the policy arguments presented by the states and the United States, it is necessary to address these arguments.

A. The State is not a civil antitrust superplaintiff.

The State bases two of its policy arguments on broad and incorrect readings of the legislative history of the Hart-Scott-Rodino Act as a whole. One of these arguments is that Congress intended to create a hierarchy of civil antitrust plaintiffs under which the interests of states as a general matter are to be considered more worthy than the interests of private persons. Because the states carry this special status of worthiness, the argument runs, the courts must regard any request by states for grand jury materials as

"compelling" where a request by a private litigant would not be.

The first defect in this argument is the presumption that Congress can call upon the courts to modify traditional rules of procedure for certain persons simply by indicating that such persons are favorites of the law. As explained above, Congress did not address the question of disclosing grand jury materials in Section 4F(b) or anywhere else in the Hart-Scott-Rodino Act. Even if the states were designated favorites of the antitrust laws, this fact would not justify routine disclosure of grand jury materials, any more than it would justify disregard of the attorney-client privilege or the general admission of hearsay testimony at the states' request.

In fact, Congress has not made the rights of states in civil antitrust cases superior as a general matter to the rights of private plaintiffs. The State's misconception of its role in antitrust litigation lies in part in its underestimation of the public interest in private enforcement of the antitrust laws. This Court has recognized that Congress' purpose in providing for private enforcement of the antitrust laws was "not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969). With this purpose in mind, the Court has referred to private antitrust plaintiffs as "private attorneys general." Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).

Instead of creating a hierarchy among civil antitrust plaintiffs, Congress in the Hart-Scott-Rodino Act moved to fill a perceived "gap" in antitrust enforcement left by the practical inability of ordinary consumers to bring effective private actions on their own behalf. H.R. Rep. No. 94-499, Part I, 94th Cong., 2d Sess. ("House Report") at 4; reprinted in [1976] U.S. Code Cong. & Ad. News ("News") at 2574. Congress recognized that treble damages actions brought by "large purchasers" had been an effective means of enforcing the antitrust laws, because such plaintiffs "are likely to have detailed evidence, a sufficiently large economic stake to bear the inevitable risks of a lawsuit, and the resources to meet the apparently inevitable costs of protracted and complex litigation." Id. (Testimony of

Thomas Kauper, Assistant Attorney General for Antitrust). The federal antitrust statutes, however, did not provide "effective redress for the injury inflicted upon consumers," because they lacked the information and economic incentive necessary to maintain individual actions and they faced significant legal obstacles in collective attempts to obtain redress. House Report at 4-8; News at 2573-78.

To overcome these difficulties, Congress expressly authorized state governments to bring actions on behalf of state citizens injured by antitrust violations and addressed specific problems associated with such "parens patriae" actions. A parens patriae suit, for instance, may require proof of damages to thousands or millions of

consumers, a problem of proof not encountered by the large private antitrust plaintiff suing on its own behalf. To avoid the practical difficulty of proving the separate injury to each consumer, Congress permitted damages to be determined with respect to the consumer class as a whole by statistical or sampling methods. 15 U.S.C. §15d; House Report at 13-16, News at 2583-85.

The Hart-Scott-Rodino Act thus is designed to place the rights of individual consumers injured by antitrust violations on an equal footing with the businesses which have traditionally been plaintiffs under Section 4 of the Clayton Act. Congress specifically stated that the provisions create

> no new substantive liability. Each person on whose behalf the State attorney general is empowered to sue has his own cause

> of action under Section 4 of the Clayton Act, even if, for practical reasons, the right to sue is not likely to be exercised.

House Report at 9, News at 2578. As advocates of the rights of consumers, state attorneys general are not, as the State claims, "preferred" over persons who undertake enforcement of the antitrust laws on their own behalf. Brief for Petitioner at 37. The states fill a different but equally important role in the enforcement of the antitrust laws.

The State relies on its asserted superior status to justify a result which would be patently unfair to private antitrust plaintiffs. Under the desired result, states would be entitled to ask the courts, as the district court put it, to "Hand us our case ready made for us by the grand jury." Petition for Certiorari, Appendix F, at 37a. The

private plaintiffs, on the other hand, would have to undertake the burden and expense of complex and time-consuming discovery to achieve the same result. This difference would permit a state to obtain a recovery, through settlement or damages, which an equally injured private plaintiff might never obtain.

When the states and the private plaintiffs are viewed, as they should be, as coordinate agents of civil antitrust enforcement, the result sought by the State is absurd. Congress never contemplated giving the states a major litigation advantage over private plaintiffs. When Congress considered the disclosure of grand jury materials in civil antitrust litigation, it considered disclosing them to all civil antitrust plaintiffs. See S. Rep. No. 94-803, 94th Cong., 2d Sess., 33-35, 110

(1976). Congress declined to authorize such disclosure, however, in recognition of the interests served by grand jury secrecy. Section 4F itself serves to alert state governments to the possible existence of antitrust violations affecting consumers and to inform them about the scope and impact of such violations. It was not intended to give state governments a head start in discovery at the expense of grand jury secrecy.

The State also argues that state attorneys general are "worthy to be entrusted with grand jury materials," while private plaintiffs are not, because they are "responsible public officials." Brief for Petitioner at 37. Without any disparagement of the individuals who presently hold the offices of state attorney general, this

claim to superiority must also be rejected. The temptations of governmental power are no less strong than the temptations of private interest. Many of our constitutional rights, including the right to indictment by a grand jury, recognize the potential for governmental mischief and the great danger associated with it. Protection of the innocent, encouragement of full disclosure by federal grand jury witnesses, and all the other interests served by grand jury secrecy would be substantially undermined by routine disclosure of antitrust grand jury materials to the states. The United States itself is adamantly opposed to such disclosure while its own criminal enforcement efforts are pending because of the danger such disclosure would pose to those efforts. Brief for United States at 26 & n.19. Disclosure

to the states poses as much danger to the other societal interests served by grand jury secrecy as it poses to the government's immediate criminal enforcement efforts.

As a matter of common law, governments as civil plaintiffs face the same procedural rules and limitations as private plaintiffs. See United States v. Stinson, 197 U.S. 200, 205 (1905); United States v. Cless, 254 F.2d 590, 593 (3d Cir. 1958); Missouri v. Homesteaders Life Ass'n., 16 F. Supp. 69, 74 (W.D. Mo. 1936), aff'd, 90 F.2d 543 (8th Cir. 1937). Where Congress intends to give a government special advantages in civil litigation in derogation of the common law presumption of equality, it must be explicit. See Robert C. Herd & Co., Inc. v. Krawill Machinery Corp., supra, 359 U.S. at 304-05; United States

v. Cless, supra, 254 F.2d at 593. Congress has not even hinted that the states should be given routine access to grand jury materials, much less said so.

Congress had an opportunity after enactment of Section 4F(b) to include state attorneys general among those governmental officials who are entitled to obtain federal grand jury materials on a routine basis, but it declined to do so. On April 26, 1976, this Court promulgated amendments to Rule 6(e) to expand the catagories of persons to whom grand jury materials could be disclosed, including not only government attorneys but also "such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." Amendments to Federal

Rules of Criminal Procedure, 425 U.S. 1157, 1161 (1976). When Congress approved the amendments on July 30, 1977, it redrafted Rule 6(e) for purposes of clarity, allowing disclosure to government attorneys and "such government personnel as are deemed necessary . . . to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Rule 6(e), Fed. R. Crim. P.; S. Rep. No. 95-354, 95th Cong., 1st Sess. 6-8, reprinted in [1977] U.S. Code Cong. & Ad. News 527, 529-32. In this review and modification of Rule 6(e), Congress did not authorize disclosure to state attorneys general.

B. Disclosure of grand jury materials is not necessary to give Section 4F(b) practical significance.

The State and the United States argue that, unless the district courts grant the states easy access to anti-trust grand jury materials after federal proceedings have terminated, Section 4F(b) will have little meaning in most cases, because almost all of the federal government's investigation in cartel cases takes place before the grand jury. They argue that grand jury materials must be disclosed to the states on a routine basis to give the states the assistance that Congress purportedly wanted them to have. This argument is invalid for several reasons.

First, Congress could not know how much assistance Section 4F(b) would

provide to a state attorney general in any particular case and did not attempt to guarantee that state attorneys general would receive any minimum degree of assistance under that provision. Congress simply directed the United States Attorney General to provide state attorneys general with as much assistance as he could by law.

Second, Section 4F(b) is not without value to state attorneys general. The State and United States underestimate for purposes of argument the amount of material that must be disclosed under this provision. As the Second Circuit pointed out in In re Grand Jury Investigation of Cuisinarts, Inc., supra, 665 F.2d at 31, Section 4F(b) can provide state attorneys general with a "broad spectrum" of materials from the Justice Department's

files, including "information that the Justice Department obtained through civil discovery and through investigations by its Staff, staff memoranda, and government data and analyses." Section 4F(b) compels the United States Attorney General to disclose such materials to state attorneys general on request.

Third, the Justice Department's heretofore unannounced practice of conducting almost all of its antitrust investigations before the grand jury does not affect the scope of Section 4F(b). If in fact almost all of the investigative materials collected by the Justice Department in antitrust investigations are grand jury materials, the State and the United States have conspicuously failed to demonstrate that Congress was aware of this fact when it

enacted Section 4F(b). The understanding of Congress about the relationship between the government's investigations and the grand jury is reflected in the Senate Report on the 1977 amendments of Rule 6(e):

> Federal crimes are "investigated" by the FBI, the IRS, or by Treasury agents and not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to the grand juries.

S. Rep. No. 95-354, 95th Cong., 1st Sess. 6, reprinted in [1977] U.S. Code Cong. & Ad. News 527, 530. It is fair to assume, in the absence of evidence to the contrary, that Congress had this same understanding of grand jury proceedings when it enacted Section 4F(b) during the preceding year.

Fourth, the Justice Department by implication seeks approval of its practice of conducting antitrust investigations almost entirely before the grand jury. As a matter of policy, this practice should be discouraged, and the Justice Department should be encouraged to conduct as much of its antitrust investigations as it can by other means before bringing its cases to the grand jury.

The grand jury has an important constitutional duty to determine that there is probable cause to believe that a crime has been committed and to protect citizens against unfounded criminal prosecutions. United States v. Dionisio, supra, 410 U.S. at 16-17; Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972). Performance of this duty becomes virtually impossible if the

citizens who are members of the grand jury are required to sit and watch the raw investigative efforts of the Justice Department for periods of up to 18 months before voting on proposed indictments. See generally Rule 6(g), Fed. R. Crim P. For this reason, the Seventh Circuit has held that it is an abuse of the grand jury process for the government to require the grand jury to perform investigative work that can be, and has been, successfully accomplished by the regular investigative agencies of the government. In re September 1971 Grand Jury 454 F.2d 580 (7th Cir. 1971), rev'd on other grounds sub nom. United States v. Mara, 410 U.S. 19 (1973).

The volume of evidence and the complexity of issues in antitrust cases has drawn into question the ability of the petit jury in some civil cases to

render a verdict at trial in accordance with due process of law. See In re Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980). It is even more difficult for a grand jury to vote intelligently where it has witnessed months of testimony presented, not as the result of careful trial preparation, but in the course of the investigative efforts of the Justice Department. Because of the difficulty faced by the antitrust grand jury in performing its constitutional role, one commentator has noted, with unintended irony, that the Justice Department's internal review of each proposed anti-trust indictment, rather than the grand jury itself, is "[o]ne of the greatest protections a prospective defendant has against arbitrary or capricious criminal accusations." Steinhouse, Antitrust

Grand Jury Procedure, 23 Clev. St. L. Rev. 447, 467 (1974).

It is not necessary in this case to decide whether it is proper for the Justice Department to use the grand jury for investigative purposes in antitrust cases. The Seventh Circuit, in its decision below, was careful to disclaim any criticism of the Justice Department's methods when it noted its surprise in learning that antitrust investigations are from the outset conducted almost entirely before the grand jury. Petition for Certiorari at 6a. To the extent, however, that Section 4F(b) encourages the Justice Department to conduct more extensive preliminary investigations before presenting its cases to the antitrust grand jury, it will serve not only the

interests of the states as civil anti-trust plaintiffs but also the vitality of the grand jury as an independent decision-making body.

C. Savings in tax dollars does not justify the harm that would be done by routine disclosure of grand jury materials to the states.

The heart of the policy arguments presented by the State and the United States is the proposition that it would save taxpayers' money to give states easy access to grand jury materials. It is this concern which makes grand jury materials such a tempting reservoir of facts to the states. It is to avoid the expense of duplicating the information collected by the grand jury that prompts the State to seek a position superior to ordinary

private plaintiffs in antitrust litigation. Reducing the tax burden is indeed a matter of great political moment. The policies which underlie the doctrine of grand jury secrecy, however, are far more important and lasting.

The interests of Inland and Krueger in this case are central to the interests at stake in maintaining the secrecy of the Grand Jury's proceedings. Inland and Krueger are not seeking to avoid civil liability in the civil antitrust action brought by the State. They are not defendants in that action. Indeed, what most concerns Inland and Krueger about the Grand Jury's proceedings is not what they know about these proceedings, but what they do not know. They could easily have been called to produce documents and to testify to the Grand Jury because

someone accused them or otherwise mentioned them unfavorably in earlier testimony. They would have no remedy for the defamatory injury which would result if such material were disclosed. Similarly, disclosure of Krueger's testimony might unjustifiably injure others whom he mentioned and indirectly harm him.

The interests at stake, of course, are not limited to the interests of those who participated in the Grand Jury's proceedings. If states can routinely obtain access to antitrust grand jury materials after federal criminal proceedings have terminated, no witness appearing before a grand jury can be assured that his testimony will remain secret. His testimony will be tempered by the knowledge that it will

be reviewed at least by state authorities, and possibly by others, in later civil antitrust proceedings. Under these circumstances, the grand jury's ability to obtain full and candid disclosure by witnesses which it calls, and ultimately the grand jury's effectiveness as an investigative body, will suffer.

The State attempts to minimize the harm done by disclosure by: (a) suggesting that disclosure be withheld if opponents can show that disclosure should not be permitted "under the relevant circumstances of the case," (b) presuming that only the states would obtain access to the materials in the civil antitrust litigation, and (c) suggesting that protective limitations be imposed on the use of the disclosed materials "as may be appropriate under

the peculiar facts of the case." Brief for Petitioner at 43. These limitations, however, are illusory and do not offer a satisfactory alternative to secrecy.

First, requiring opponents of disclosure to establish "relevant circumstances" justifying secrecy in each case would make it impossible for most participants in the grand jury proceedings to protect themselves from harm. Because grand jury proceedings are secret, the participants cannot know what defamatory information exists in the grand jury materials until they have been disclosed and the harm has been done.

Second, disclosure of grand jury materials to a state would be only the beginning of widespread disclosure

in a typical civil antitrust trust case. Possession of grand jury materials by an opposing party in a civil antitrust case is one of the most significant factors in determining whether "particularized need" exists in a disclosure request, because the courts have recognized that there is an unfairness in permitting one side to have "exclusive access to a storehouse of relevant facts." See Dennis v. United States, 384 U.S. 855, 873 (1966); Illinois v. Sarbaugh, 552 F.2d 768, 776 (7th Cir. 1977); In re Screws Antitrust Litigation, 91 F.R.D. 47, 49-50 (D. Mass. 1981). The Defendants in the instant case will certainly seek any grand jury materials disclosed to the State, because they cannot be expected to prepare their defense adequately without knowing what information the

tory injury and give grand jury witnesses the assurance they need that their testimony will not be made public.

The traditional standard of particularized need preserves the general rule of nondisclosure. Parties may obtain grand jury materials under this standard only when their need is "compelling," i.e., when they face a substantial threat of injustice, and even under these circumstances the disclosure must be limited to that material directly pertinent to the need for disclosure. United States v. Procter & Gamble Co., supra, 356 U.S. at 682-83; Douglas Oil Co. v. Petrol Stops Northwest, supra, 441 U.S. at 222. Secrecy has been the traditional method of preserving the rights of the innocent accused and the vitality of the grand

State has obtained. Similarly, once the Defendants have obtained the grand jury materials, the Private Plaintiffs will seek the materials from the Defendants on the same ground. Thus, disclosure of grand jury materials to the State would be merely the first step in disclosure to all parties.

Third, protective orders are not a satisfactory alternative to non-disclosure as a means of preserving grand jury secrecy. If Krueger's testimony and Inland's documents can be disclosed to the State, to Inland's competitors and to Inland's customers, no protective order can preserve either the substance or the appearance of secrecy. Only a firm general rule of nondisclosure can protect participants in grand jury proceedings from defama-

jury for centuries. Reliance on protective orders in the long term to protect these interests would debase them.

It is revealing that the United States, while it argues that protective orders are sufficient to protect the innocent accused and the vitality of the grand jury as an institution, is unwilling to rely on such orders instead of nondisclosure to protect its own criminal enforcement efforts. Disclosure does not pose any threat to the government's criminal enforcement efforts that it does not equally pose to the innocent accused and to the proper functioning of the grand jury.

The federal government's immediate criminal enforcement efforts are not worthy of greater protection than

the rights of the innocent accused and the viability of the grand jury. In a proposed charge which the Justice Department prepared several years ago for use by district courts in convening antitrust grand juries, the Department cited protection of the innocent accused as "probably the most important reason" for grand jury secrecy. Antitrust Grand Jury Practice Manual, supra at 23 n.16a & App. 44 p.4. To hold that this interest must bow to the financial needs of state governments, as the United States asserts in this case, would be to derogate the historic and constitutionally preserved purpose of the grand jury to serve as a "protector of citizens" against unfounded criminal accusations. United States v. Calandra, supra, 414 U.S. at 342-43.

The institution of the grand jury should not be undermined to serve an immediate political interest in saving taxpayers' money.

## CONCLUSION

For the reasons set forth above, Intervenors-Respondents Inland Heating & Air Conditioning Company and Lawrence Krueger request the Court to affirm the judgment of the Court of Appeals for the Seventh Circuit.

DATED:

August 13, 1982

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# Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1114

# In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ILLINOIS,

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vs.

ABBOTT & ASSOCIATES, INC., et al.,

*Respondents.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR CERTIORARI FILED
DECEMBER 15, 1981
CERTIORARI GRANTED MARCH 22, 1982

Printed by Authority of the State of Illinois (P.O. 31266—120—11-12-82)

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## EXPLANATORY NOTE

The following abbreviations are used in this Reply Brief:

| | |
|---|---|
| "Pet. Br. at ____" | Opening brief of petitioner. |
| "U.S. Br. at ____" | Opening brief of respondent United States. |
| "Joint Br. at ____" | Joint brief for 86 respondents. |
| "Climatemp Br. at ____" | Brief for respondents Climatemp, Inc., and Victor Comforte. |
| "Inland Br. at ____" | Brief of intervenors Inland Heating & Air Conditioning Co. and Lawrence Krueger. |
| "Tex.Am.Br. at ____" | Amicus brief of certain appellants in No. 81-1059 (5th Cir.) |
| "Cuis.Am.Br. at ____" | Amicus brief of Cuisinarts, Inc. |

No. 81-1114

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OCTOBER TERM, 1981

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## REPLY BRIEF FOR PETITIONER

## ARGUMENT

### I.

### RESPONDENTS' INTERPRETATION OF SECTION 4F(b), UNDER WHICH STATE ATTORNEYS GENERAL ARE EFFECTIVELY DESTINED TO RECEIVE NOTHING OF VALUE, IS AN OVERLY RESTRICTIVE AND NONSENSICAL APPROACH TO THE LANGUAGE AND PURPOSE OF THE STATUTE.

#### A. Respondents' Interpretation Violates Fundamental Principles Of Statutory Construction.

First, respondents argue that Section 4F(b) was only a limited and insignificant part of a complex statutory scheme. Thus, respondents suggest that the provision should be given less importance and meaning than other aspects of that legislation. (Joint Br. at 9). However, construing a statute so as to attribute no importance or effect to one of its provisions is clearly erroneous. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *Administrator, Federal Aviation Admin. v. Robertson*, 422 U.S. 255, 261 (1975). Section 4F(b) was included in the statute as part of a comprehensive scheme of national antitrust enforcement.[1] It should be accorded an interpreta-

[1] Respondents suggest that Hart-Scott-Rodino was a limited legislative response to a perceived loophole in antitrust liability. But Congress had a different view. The Senate Report on S.1284 emphasizes that the purpose of the Act was to "support and invigorate effective and expeditious enforcement of the antitrust laws, to improve and modernize antitrust investigation and enforcement mechanisms . . . ." *S.Rep.No. 94-803*, 94th Cong., 2d Sess. 1 (1976). According to the Senate Report: "A major factor underlying the ineffectiveness of the antitrust laws is the inadequacy of existing investigatory, enforcement, deterrent and procedural aspects of present law." *Id. See also Hearings Before The Subcomm. on Monopolies and Comm. Law Of the House Judiciary Comm. On H.R. 12528 and H.R. 12921*, 93d Cong., 2d Sess. Ser. 43, at 12-13 (1974).

tion which complements this Congressional scheme. Respondents' interpretation not only fails to do so, but improperly reads Section 4F(b) out of the statute since everything they claim Congress intended to accomplish is contained in the remaining sections of the Hart-Scott-Rodino Act. *See Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 633 (1973); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

Respondents also argue that in construing the meaning of Section 4F(b) it is improper for this Court to consider the unmistakable evidence of Congressional purpose underlying the provision. Thus, rather than admit that their sought after interpretation of the statute will frustrate the stated purposes of Congress by supplying attorneys general with nothing of value, respondents simply suggest that such policies are unimportant.

That, however, is clearly not the law. The phrases "investigative files or other materials" and "to the extent permitted by law" are nowhere defined in the statute. In such a situation, it is appropriate and necessary for the Court to consider policy considerations in fleshing out the terms of the statute, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 738-39 (1975), and to give effect to the express purposes of Congress. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979); *FBI v. Abramson*, ..... U.S. ....., 102 S.Ct. 2054, 2061 n.7 (1982), *citing NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957), (Frankfurter, J., concurring and dissenting).

Respondents alternatively contend that this Court should not construe the statute in whatever way petitioner believes will maximize antitrust enforcement "in some abstract sense". (Joint Br. at 38). However, invigorated antitrust enforcement by the states is not the abstract purpose of the petitioner, but rather the express goal of Congress.

**B. Congress Was Clearly Aware That The Attorney General Primarily Uses The Grand Jury To Investigate Hard Core Antitrust Restraints.**

Respondents insist that the Congress which enacted Section 4F(b) was unaware of the manner in which grand juries are used in federal antitrust investigations. (Joint Br. at 43; Inland Br. at 69-70). Respondents attempt to paint a picture of a Congress studying antitrust improvements and procedures for several years while remaining ignorant of the basic facts of how the primary enforcer of our antitrust laws carries out its responsibilities.[2] However, the legislative history clearly demonstrates that Congress was fully aware of the use of grand juries to investigate hard core antitrust restraints.[3] To exclude from disclosure the grand jury

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[2] Significantly, respondents themselves do not dispute the fact that the grand jury is the primary tool of Department of Justice investigations. In fact, some respondents gratuitously suggest that the DOJ should not use the grand jury as much as it does. (Inland Br. at 71; Joint Br. at 43-45).

Respondents also misstate the limited role that the FBI plays in developing antitrust investigations. (Joint Br. 42; Climatemp Br. at 24-25). While no one questions the fact that the FBI may be used to investigate antitrust violations, (*see* Antitrust Division Manual VII-15, Aug. 27, 1979), respondents ignore the legislative record before Congress which placed the involvement of the FBI in proper perspective. As Thomas Kauper of the Justice Department Antitrust Division plainly noted:

> So far as the use of the FBI is concerned, we do use the FBI from time to time for investigatory purposes, for taking of interviews, and so on. However, I think we have found that the use of the FBI in very complex investigations is really quite difficult, largely because unless someone is trained in antitrust enforcement it is rather difficult to come up with the follow-up question. We have, in most complex matters, used our own staff and not the FBI.

*Hearings Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary on H.R. 39*, 94 Cong. 1st Sess., Ser. 13, at 34 (1975).

[3] *See Hearings on H.R. 12528 and H.R. 12921 Before the Subcomm. on Monopolies and Commercial Law*, 93rd Cong. 2d

(Footnote continued on following page)

material in the investigative files of the government attorneys is to exclude the very materials which would best aid the states in bringing the class of cases contemplated by Hart-Scott-Rodino.

### C. Congress Was Not Formalizing Some Informal Practice.

The Court is informed by respondents that state attorneys general receive nothing of value under the Act because the statute was simply formalizing an informal practice.[4] (Joint Br. at 44). Of course, no authority whatsoever is provided in the statute or its legislative history for this dubious interpretation. Furthermore, it strains reason to argue that Congress was persuaded by the sponsors and advocates of Section 4F(b) (including state attorneys general) to provide state attorneys general with the same limited and valueless materials available under some undefined informal practice.

Respondents suggest that Section 4F(b) was enacted for the same purpose as Section 6(f) of the FTC Improvements Act of 1980, (Pub. L. No. 96-252, 94 Stat. 374 (1980): to give the force of law to an informal practice. Upon closer inspection, however, respondents' analogy to 6(f) is patently incorrect. Amended 6(f) streamlined a right of access to confidential business materials already available to state attorneys general under old Section 6(f), 15 U.S.C. Sec. 46 (f) (1976). *Jaymar-Ruby,*

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[3] *continued*

Sess. Ser. 43 at 23, 32 (1974) (Testimony of Kauper: discussion of the manner in which the Antitrust Division acquires, evaluates, and disseminates information on anticompetitive practices—"The most commonly used investigatory tools . . . are the grand jury and civil investigative demand . . ."

[4] Respondents do not explain how Congress could have been aware of some "informal practice," yet unaware of how the federal government investigates antitrust violations.

*Inc. v. F.T.C.*, 651 F.2d 506, 508 (7th Cir. 1981). Thus, amended 6(f) was not formalizing an informal practice, but rather was curing abuses in the prior procedure already given the force of law. 126 Cong. Rec. S 5678 (daily ed., May 21, 1980); 126 Cong. Rec. H 3158 (daily ed., May 1, 1980). These abuses involved attempts by targets of investigations to delay and obstruct disclosure through litigation. 126 Cong. Rec. 3870 (daily ed., May 20, 1980).

The informal practice prior to Section 4F(b), such as it existed, was to provide state attorneys general with little or no information specifically because of statutes and rules that generally limited disclosure. It was precisely these limitations, not because of Department of Justice reluctance, that caused no valuable information to flow to state attorneys general. In that regard, it would have made little sense to formalize a "practice" which was obviously deficient.

If analogies are to be drawn, they are more appropriately drawn by comparing Section 4F(b) to the original enactment of Section 6(f). Respondents ignore the fact that both old and new 6(f) specified that materials could only be disclosed to state attorneys general and were not available to the public;[5] authorized disclosure of materials otherwise prohibited by the Trade Secrets Act, 18 U.S.C. Sec. 1905;[6] embodied a Congressional and judicial recognition of faith in the confidentiality assertions of state attorneys general to overcome whatever

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[5] *See* Interco Inc. v. F.T.C., 478 F. Supp. 103, 106 (D.D.C. 1979); *Cf.* Exxon Corp. v. F.T.C., 589 F.2d 582 (D.C. Cir. 1978); Ashland Oil, Inc. v. F.T.C., 548 F.2d 977 (D.C. Cir. 1976).

[6] *See* Jaymar-Ruby Inc. v. F.T.C., 496 F. Supp. 838, 844 (N.D. Ind. 1980); Martin Marietta Corp. v. F.T.C., 475 F. Supp. 338, 344 (D.D.C. 1979).

concerns parties may have as to disclosure;[7] and recognized the need to supply materials to state attorneys general to carry out important national antitrust enforcement policies and to avoid duplication of effort among the federal and state law enforcement agencies.[8]

### D. Section 4F(b) Is Not Confined To Materials Compiled By The Executive Branch.

Respondents further assert that Section 4F(b) is limited to "materials compiled by the executive branch." (Joint Br. at 10-12; n.8). Respondents' interpretation simply raises a riddle, the answer to which takes us no closer to resolving Congressional intent. Rather than determine what are relevant "investigative files or other materials", we must now determine what is included within "materials compiled by the executive branch." Under respondents' interpretation, would this include materials generated by a legislative investigative commission and sent to the Department of Justice for further study or enforcement? Would this include internal memoranda and other work product generated by Department of Justice attorneys which discuss or reflect occurrences before an investigative grand jury? It is true that these materials as well as grand jury transcripts and documents are investigative materials "compiled" by the government attorneys in order to prosecute their actions. We fail to see, however, what relevance "executive branch" adds to the question. And, once again, nothing in the statute or its legislative history reflects a restriction based upon branches of government.

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[7] *See* Interco Inc. v. F.T.C., *supra* at 106; Jaymar-Ruby, Inc. v. F.T.C., *supra* at 845.

[8] *See e.g.*, 126 Cong. Rec. 3869-70 (daily ed., May 20, 1980); *See also* Fleming v. F.T.C., 670 F.2d 311, 315 (D.C.Cir. 1982); Interco Inc. v. F.T.C., *supra* at 107.

**E. The Government's Assertion Of Secrecy Regarding The Materials Withheld Was Not Unreasonable.**

Several respondents argue that the United States Attorney General has draped the cloak of secrecy too broadly over the material in his files. (Climatemp Br. at 21-23; Joint Br. at 42, n.44).[9] This allegedly overbroad assertion of secrecy by the Attorney General, however, only serves to underscore the impossibility of differentiating between grand jury and non-grand jury materials within a single investigative file. If additional witness interviews[10] or immunization requests are available as respondents contend, the Department of Justice has indicated that such documents may reveal the focus of matters occurring before the grand jury and are not disclosable absent order of court. *See* J.A. 7 (Government's response to the Section 4F(b) request); *See also In re The Special February, 1975 Grand Jury (Baggot),*

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[9] Curiously, some respondents argue that the state received only valueless information due to an overly restrictive Section 4F(b) request. (Joint Br. at 42, n. 44). However, the scope of the State's 4F(b) request properly extended to all relevant materials in the possession of the Attorney General. For example, the State's Section 4F(b) letter to the Department of Justice concerning the Climatemp case (J.A. 5.) sought the disclosure of "whatever information [Justice] can supply . . . which may be relevant to an actual or potential cause of action . . ." The Justice Department responded by producing 19 pages and stated that the remaining materials were governed by Rule 6(e). (J.A. 9). The State thereafter petitioned the court for an order allowing disclosure of all the withheld grand jury materials. (J.A. 12).

[10] On September 20, 1982, the Illinois Attorney General received from the United States Department of Justice a copy of the sworn statement of an individual provided to the Government in connection with United States v. Borg, Inc., 79 CR 67 (N.D.Ill.). Even if other non-grand jury materials could be identified within the investigative files of the Attorney General, the disclosure of grand jury materials is still essential to avoid an emasculation of the evaluation and litigation process envisioned by Section 4F(b). (*See* Pet. Br. at 17).

662 F.2d 1232, 1237-38 (7th Cir. 1981), *cert. granted*, ..... U.S. ....., 102 S. Ct. 2955 (1982); *United States v. Armco Steel Corp.*, 458 F.Supp. 784, 789-90 (W.D.Mo. 1978); *See generally Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, reprinted in* 91 F.R.D. 289, 306 (1981). Respondents' argument compels the conclusion that the courts must conduct an *in camera* inspection of the entire investigative file of the Attorney General in every Section 4F(b) request for a determination of what is not covered by Rule 6(e). This Court has rejected the *in camera* inspection approach in grand jury secrecy cases. *See, e.g., Dennis v. United States*, 384 U.S. 855, 874-75 (1966).

### F. Traditional Discovery And Investigative Techniques Do Not Eliminate The Need For Disclosure Of Grand Jury Materials Pursuant To Section 4F(b).

First, some respondents suggest that sufficient materials are available to the state through the avenues of civil discovery (Joint Br. at 41; Climatemp Br. at 25).[11] However, an interpretation of Section 4F(b) which requires the states to obtain worthwhile information only through traditional discovery methods truly does render meaningless the disclosure provisions of Section 4F(b). The tools of litigation discovery are unavailable to a state in the prefiling context in which Section 4F(b) was designed to function. It is absolutely absurd to suggest that Congress intended the states to evaluate Section 4F(a) notices by filing lawsuits and taking normal discovery.

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[11] Respondents' contention (Climatemp Br. at 25) that the State has failed to pursue civil discovery in the Climatemp case is untrue. The district court record clearly reveals that the State has made comprehensive discovery efforts only to have defendants respond with wholesale fifth amendment assertions.

Second, the empanelling of state grand juries or the issuance of state CIDs to investigate the same conspiracy, interrogate the same witnesses, and compel the production of the same documents as the federal investigation are not examples of increased "coordination, communication, and cooperation among Federal and State antitrust enforcers" envisioned by Congress. *House Hearing Before the Subcommittee on Monopolies and Comm. Law of the House Judiciary Comm. on H.R. 12528 and H.R. 12921*, 93d Cong. 2d Sess., Ser. 43, at 12 (1974).

Third, respondents' interpretation disregards the fact that Hart-Scott-Rodino was designed to augment state investigative efforts and to compensate for meager state investigative resources. *See* Pet. Br. at 40; *See also Antitrust—Disclosure of Grand Jury Transcripts Under the Hart-Scott-Rodino Act & Parens Patriae Litigation In The Fourth Circuit—United States v. Colonial Chevrolet Corp.*, 17 Wake Forest L. Rev. 223, 227-230 (1981) (Hereinafter "Wake Forest L. Rev.").

Finally, contrary to respondents' assertion, (Climatemp Br. at 25), a criminal trial transcript is no substitute for grand jury materials. Trial proceedings are necessarily focused only upon the activities of the defendants which stand trial. For example, in the *Borg/Climatemp/Reynolds* criminal cases, only nine of the 59 named defendants stood trial and only the limited number of building projects upon which those nine conspired formed the bases of the trials. The potential breadth of the conspiracy as suggested in the bill of particulars simply is not confirmed in the trial transcripts. Moreover, the Government was not required to explore the question of damages at the criminal trials, although the fact of injury is relevant to the state's cases and may have been discussed at the grand jury. In sum, there is absolutely nothing in Section 4F(b) which conditions

disclosure of investigative files upon the unavailability of a criminal trial transcript.[12]

## II.

## RESPONDENTS' INTERPRETATION OF SECTION 4F(b) IS BASED UPON A STRAINED CONSTRUCTION OF LEGISLATIVE HISTORY WHICH IS EXTRANEOUS TO THE INTENT OF THE CONGRESS WHICH ENACTED 4F(b).

### A. Respondents Ignore The Fundamental Differences Between Titles I and III Of The Hart-Scott-Rodino Act.

Respondents maintain that a Congressional intent to deny disclosure of grand jury materials under Section 4F(b) is manifested by a prohibition of disclosure of CID materials under the Antitrust Civil Process Act, 15 U.S.C. Sec. 1313(c)-(e). (Cuis. Am. Br. at 19; Tex. Am. Br. at 5; Joint Br. at 32-33).

However, respondents' contentions are based on both a glaring misconception of 15 U.S.C. Sec. 1313(c)-(e) and a refusal to recognize a fundamental distinction between the focus of Titles I and III of the Hart-Scott-Rodino Act. First, 15 U.S.C. Sec. 1313(c)(3) specifically prohibits disclosure of CID documents "except as otherwise provided in [that] section." However, no such bar attaches to those materials which have passed into the control of any court

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[12] The statistics relied upon to support the proposition that state attorneys general have adequate investigative tools and therefore no need for Section 4F(b) are grossly inaccurate. Respondents assert that "305 of 307 reported state antitrust enforcement actions had resulted in judgments for the states." (Joint Br. at 41). However, the empirical study cited by respondents actually discloses that only 33 of 307 cases were disposed of by "judgments for the states." Empirical Research Project, *Reviving State Antitrust Enforcement: The Problems With Putting New Wine In Old Wine Skins*, 4 J. Corp. L. 547, Appendix B at 666 (1979).

or grand jury. 15 U.S.C. Secs. 1313(d)(1), (e)(2). Thus, contrary to respondents' position, a court granting access to grand jury materials which include CID materials would not violate the confidentiality requirements of the Antitrust Civil Process Act.

Second, far from highlighting an inconsistency in the petitioner's argument, the distinction between CID documents and grand jury materials is sound. The focus of Title III's *parens patriae* amendments is on hard core restraints.[13] The CID procedure is used in merger cases or where the suspected activity is considered insufficient to warrant criminal action. Because the Justice Department considers price fixing a criminal offense and uses the grand jury to investigate price fixing violations, Congress did not believe it essential to authorize disclosure of CID materials to bolster enforcement of hard core restraints.

Moreover, Congress was clearly aware that many states already possessed the CID powers that Hart-Scott-Rodino was granting to the United States for the first time. A new avenue for plenary access to CID materials was not essential for the states. *See S. Rep. No. 94-803*, 94th Cong., 2d Sess., Pt. I at 3. Finally, CID materials are readily available through civil discovery because the actual CID document demands and interrogatories are not precluded from disclosure. 15 U.S.C. Sec. 1313(c)(3). Grand jury subpoenas and document requests have been precluded from disclosure. *See e.g. United States v. White Ready-Mix Concrete Co.*, 509 F.Sup. 747, 750 (N.D. Ohio 1981).

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[13] *See* 15 U.S.C. Sec. 15c, Sec. 15d (limiting *parens patriae* and aggregation of damages provisions to cases based upon violations of the Sherman Act). *See also* 122 Cong. Rec. H 2067 (McClory); 15418 (Hart); 29147 (Abourezk): emphasizing the focus of the bill on hard core restraints.

**B. The 1977 And 1979 Amendments To Rule 6(e) Are Not Authoritative Expressions Concerning The Scope And Purpose Of Section 4F(b).**

Respondents argue that the failure of the 1977 Amendments to Rule 6(e) to include state attorneys general in the category of persons authorized to assist the Department of Justice in grand jury proceedings signifies a legislative intent of an earlier Congress to make such materials unavailable to the states under Section 4F(b). (Joint Br. at 35-37).[14] Respondents also submit that the 1979 Amendment to Rule 6(e), which provides for the mandatory recording of grand jury proceedings, somehow reaffirms an earlier congressional intent to bar disclosure to the states.

These subsequent amendments to Rule 6(e)(1) are wholly inapposite to the issue presented by this appeal. The 1977 amendment to Rule 6(e) specifically addresses the "fact that there is often government personnel assisting the Justice Department in grand jury proceedings" and that "[i]t is absolutely necessary in grand jury investigations involving analysis of books and records, for the government attorneys to rely upon investigative personnel (from the government agencies) for assistance." *Advisory Committee Note to Proposed 1977 Amendment to Rule 6*, 8 Moore's Federal Practice Par. 6.01 [6], at 6-15 (2d Ed. 1980). Accordingly, Rule 6(e) was redrafted to accommodate the belief that federal prosecutors should be able, without the requirement of prior judicial interposition, to make such disclosures of grand jury information to other government personnel as they deem neces-

[14] The views of a later Congress concerning an unrelated subpart of Rule 6(e), let alone a different statute, are entitled to very little, if any, weight. *See* Teamsters v. United States, 431 U.S. 324, 354 n. 39 (1977); Blanchette v. Connecticut General Ins. Corp., 419 U.S. 102, 133-35 (1974).

sary to facilitate their duties of criminal law enforcement. *S. Rep. No. 95-354*, 95th Cong., 1st Sess. 8 (1977).

Congress was not amending the rule with respect to civil disclosure.[15] Congress let stand Rule 6(e)(3)(c) which specifically permits disclosure of grand jury material "when so directed by a court preliminarily to or in connection with a judicial proceeding."[16]

The application of the 1979 Amendment to Section 4F(b) is even more remote. In order to eliminate any confusion with respect to the permissive or mandatory recording of grand jury proceedings, Congress amended Rule 6(e) to provide that all proceedings be recorded stenographically or by an electronic recording device. Congress also provided that the notes or transcripts prepared therefrom should remain in the custody or control of the government attorney. Fed. R. Crim. P. 6(e), Advisory Committee Notes, *reprinted in* 18 U.S.C.A. (West Supp. 1982) at 44.

As the Senate Report made clear, this amendment did not address itself to the circumstances in which disclosure is permitted, but rather merely cautioned that the "[s]ecrecy of grand jury proceedings is not jeopardized by recordation. The making of a record cannot be equated with disclosure of its contents, and disclosure is

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[15] Respondents' argument to the contrary is based on a quote from a Senate Committee Report that is taken out of context. The quote was solely addressed to the federal government's use of grand jury materials in its civil enforcement actions. *S. Rep. No. 95-354*, 95th Cong., 1st Sess., 8 (1977).

[16] As the Senate Committee Report to Rule 6 indicated, there was "no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation." *S. Rep. No. 95-354*, 95th Cong., 1st Sess. 8 (1977).

controlled by other means [citation omitted]." Advisory Committee Notes, *supra* at 45.

### C. Congress' Failure To Enact Section 202 Is No Guide To Discerning The Meaning And Purpose Of Section 4F(b).

Respondents contend that the Senate's failure to incorporate Section 202(k) and (l) of Senate Bill 1284 in the final version of the Hart-Scott-Rodino Act "shows unambiguously that Congress did not intend Section 4F(b) to alter the law of grand jury secrecy." (Joint Br. at 25-26).

However, as the Supreme Court has repeatedly noted, unsuccessful attempts at legislation are, at best, an ambiguous guide to discerning Congressional intent. *See United States v. Wise*, 370 U.S. 405, 411 (1962); *United States v. Turley*, 352 U.S. 407, 415 n.14 (1957).

In addition, Section 202 and Section 4F(b) are not comparable provisions.[17] Section 202 provided broad disclosure of grand jury materials to all civil antitrust plaintiffs.[18] To the contrary, Section 4F(b) provides for a careful and limited disclosure of grand jury materials to state attorneys general. Understood in this light, Section 4F(b) overwhelmingly passed the House and Senate without

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[17] As Senator Abourezk's chart notes, Section 202, termed a "miscellaneous provision," was originally addressed as a part of the Senate's Antitrust Civil Process Act amendments. *See* 122 Cong. Rec. 29152 (1976). Unlike Section 202, Section 4F(b) was specifically created to evaluate the 4F(a) notice provided by the U.S. Attorney General and promote the subsequent filing of *parens patriae* suits against hard core antitrust restraints. Accordingly, Senator Abourezk did not scrutinize these provisions under the same category.

[18] Respondents' representation that Section 202 was supported by "numerous" state attorneys general is highly misleading. (Joint Br. at 26); *See Senate Hearings on S. 1284*, (Part 1), 94th Cong., 1st Sess. 275-78 (1975) (remarks of Attorney

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stated opposition, thereby demonstrating Congress' intent that state attorneys general are preferred advocates of national antitrust policy and worthy to be entrusted with grand jury materials.

### D. Respondents Refuse To Recognize The Special Status Conferred Upon State Attorneys General By Section 4F(b).

Respondents assert that "neither the language nor the legislative history of Section 4F(b) contemplates any preferred position for state attorneys general". (Joint Br. at 39, n.40). Yet, nothing is more clear from the legislative history and language of Hart-Scott-Rodino than the fact that state attorneys general were accorded a special status as antitrust enforcers. *See* Pet. Br. at 35-38; *See also*, Wake Forest L. Rev., *supra* at 240-41.

Inland advances the novel argument that conferring special status to state attorneys general in the enforcement of the antitrust laws is unfair to private antitrust plaintiffs because it would create a greater likelihood of success for public actions brought by state attorneys general.[19] (Inland Br. at 60). Apparently, Inland would have

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[18] *continued*
General Miller). Responding to the merits of Title VI of the Senate Bill (nolo pleas), Attorney General Miller advocated the disclosure of grand jury materials "to other governmental litigants, whenever such a litigant is a state," in order to foster the goal of state and federal cooperation. *Senate Hearings*, *supra*, at 275. When asked whether such disclosure should be extended to private plaintiffs, Attorney General Miller recommended that grand jury materials be made available to state attorneys general only. *Senate Hearings*, *supra*, at 278.

[19] Actions in the name of the state as *parens patriae* under 15 U.S.C. 15c are brought not to enforce mere private rights, but rather to vindicate the public rights of its citizenry, and to further the public interests in antitrust enforcement. *See* State of Iowa v. Scott & Fetzer Co., 1982-2 Trade Cases (CCH) Par. 64,873 (S.D. Iowa 1982); State of New Mexico, as Parens

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preferred that Congress not have passed the Hart-Scott-Rodino Act at all. Inland's personal preferences for Congressional policy, although being insightful of the real purpose of opposing disclosure (i.e. to reduce the prospects of recovery for state actions) are otherwise immaterial. In fact, it was precisely Inland's personal preferences that Congress sought to defeat in passing the practical solutions of Hart-Scott-Rodino; solutions which seek to end litigation ploys which have frustrated effective antitrust enforcement. *See Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm. on S. 1284*, (Part 1), 94th Cong., 1st Sess. at 57 (1975) (Statement of Senator Hart); *Hearings Before the Subcomm. on Monopolies and Comm. Law of the House Judiciary Comm. On H.R. 12528 and H.R. 12921*, 93d Cong., 2d Sess., Ser. 43 at 15 (Statement of Chairman Rodino).

Finally, respondents concede that Congress did choose to reduce the potential of duplicating work already done by the Department of Justice. (Joint Br. at 47, n.49). However, under their interpretation virtually everything of value (and which involves the maximum potential for duplication and expense between the governmental agencies) is to be withheld from disclosure. Nothing in the legislative history bespeaks an interpretation as limited and useless as respondents suggest.

Patriae v. Scott & Fetzer Co., 1982-2 Trade Cases (CCH) Par. 64,439 (D.N.M. 1981); Clark Oil & Refining Corp. v. Ashcroft, ..... S.W.2d ..... (No. 63935, Mo. S.Ct., Aug. 31, 1982).

## III.

## NEITHER AUTOMATIC DISCLOSURE NOR A SHOWING OF TRADITIONAL PARTICULARIZED NEED RESOLVES THE COMPETING INTERESTS OF SECRECY AND DISCLOSURE EMBODIED IN RULE 6(e) AND SECTION 4F(b).

### A. Reading Section 4F(b) And Rule 6(e) *In Pari Materia*, State Attorneys General Should Not Be Required To Make The Same Showing Of Need Required Of Private Litigants.

Contrary to statements made in respondents' briefs, the petitioner has never suggested that Section 4F(b) requires automatic disclosure of grand jury materials to state attorneys general. (Climatemp Br. at 26-28; Tex. Am. Br. at 2, 4). As noted by the Solicitor General (U.S. Br. at 25-26), automatic disclosure would be contrary to both the principles of secrecy and to effective federal criminal enforcement of the antitrust laws sought to be strengthened elsewhere in Hart-Scott-Rodino.

Respondents do not dispute that Rule 6(e)(3)(c)(i) itself contains no standard for disclosure of grand jury materials. From its earliest interpretation in cases involving private litigants, this Court has consistently construed Rule 6(e) in an attempt to balance the interests of secrecy against the competing and compelling interests in disclosure. In such cases, the Court has required that the need for disclosure be stated with particularity.

The question before this Court is whether, when the considerations justifying secrecy are substantially reduced and the considerations justifying disclosure embody a specific Congressionally directed need and purpose, state attorneys general must nevertheless further state their need with the same kind of particularized showing required of every other litigant.

Congress has explicitly stated a legitimate and proper need for disclosure to the state attorneys general under

appropriate circumstances. As held by most courts which have reviewed this question, requiring a state attorney general to further undertake the burden of showing traditional particularized need would be contrary to the express purposes of Section 4F(b).

Rather, the disclosure requested pursuant to Section 4F(b) should strike a proper balance between the effective antitrust enforcement envisioned by Hart-Scott-Rodino and the residual secrecy interests of Rule 6(e).[20] Where the criminal proceedings have terminated, the competing interests of public need for disclosure and continued secrecy must be balanced in favor of the discreet disclosure of relevant grand jury materials to a state attorney general.

### B. Respondents Argue For A Rule Of Absolute Secrecy Giving No Weight To Section 4F(b).

Under the guise of sheltering the innocent accused and ensuring the effective functioning of future grand juries, some respondents argue that grand jury materials should not be disclosed under any circumstances. Respondents fail to recognize, however, that both of these objectives are preserved by the disclosure requested pursuant to Section 4F(b).

First, those innocently accused or slandered before the grand jury have no fear of public ridicule by a state attorney general. Congress expressly recognized that state attorneys general were singularly qualified to be entrusted with the investigative files of the Department of Justice. *H.R. Rep. 94-499*, 94th Cong., 2d Sess. 5 (1975). As the chief law enforcement officer of his state, the attorney general is sensitive to the needs for secrecy and

[20] The respondents, however, contend that this Court, in construing 4F(b) and 6(e) together, should not consider the needs for secrecy and the needs for disclosure. In fact, respondents' briefs scrupulously avoid a discussion of such a balance even though it is the essence of any analysis under Rule 6(e).

fully able to protect confidential information. *United States v. B.F. Goodrich Co.*, 619 F.2d 798, 801 (9th Cir. 1980); *Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894, 898 (7th Cir. 1973).

Second, the fact that innocent individuals may have been ridiculed or falsely accused before the grand jury will continue to be shielded from the public by virtue of an appropriate protective order. This would eliminate the possibility of unnecessary public ridicule. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979). Respondents' analysis imposes a rule of absolute secrecy, exaggerates the need for secrecy beyond recognized limits, and fails to accommodate disclosure "where the ends of justice require it." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940).[21]

### C. The District Court Must Exercise Substantial Discretion.

Respondents characterize the district court's function under Section 4F(b) and Rule 6(e) as "ministerial." How-

[21] Some respondents contend that petitioner has overstated the extent of prior disclosure in these cases. (Joint Br. at 48, n.50; Inland at 9). However, the Government squarely put that contention to rest in the Memorandum of the United States, filed May 19, 1980 (No. 80 C 0888, N.D. Ill.). In detailing and documenting the full extent of prior disclosure of the relevant grand jury materials, the Memorandum reveals, *inter alia*, that in the Climatemp case the grand jury documents were accessible to all defendants and the grand jury testimony of at least 17 trial witnesses was provided to the eight defendants who stood trial. Memorandum at 6-7. In the Reynolds/Borg piping cases, all grand jury transcripts were made available to all defendants in preparation for trial and inspected by at least three. Memorandum at 8. Moreover, although counsel for Kelleher Inc., appear nowhere in the inspection logs, their inspection of all grand jury testimony was acknowledged in the Borg criminal trial. Thus, no record accurately reflects the full extent of the widespread disclosure of grand jury transcripts in these cases. Finally, contrary to respondents' assertion, (Joint Br. at 48, n.50) the district court did not rule that the state had exaggerated the extent of prior disclosure at Pet. App. 38a or anywhere else in its opinion.

ever, a court called upon to rule on a petition pursuant to Rule 6(e) and Section 4F(b) must consider relevancy matters, rule on specific objections of interested parties, and determine and protect any secrecy interests which remain. Whatever semantical cast respondents wish to place on the function of the court, this Court has not described as mere "ministerial" the substantial discretion awarded to the courts to make determinations in these areas. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979).

Nor would disclosure of materials to state attorneys general pursuant to Section 4F(b) result in routine disclosure to private plaintiffs or defendants. Materials reviewed by the state attorneys general are clearly prohibited from future disclosure by the entry of protective orders.[22] Access by other parties to such materials from the Department of Justice would be governed by the traditional standards for disclosure, including the concerns for potential retaliation from employers or others within the industry. Contrary to respondents' unsupported assertions, this Court has recognized that protective orders will adequately safeguard any remaining secrecy considerations. *Douglas Oil, supra* at 223.[23]

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[22] The suggestion that the state would deliberately violate a protective order is totally false and unworthy of further comment.

[23] Where criminal proceedings have not terminated, the need for secrecy and for the Government to prosecute without distraction or interruption outweighs the need for disclosure. (U.S. Br. at 25-26). Thus the question of protective orders is irrelevant to the Government's decision to oppose disclosure of transcripts to the states prior to the termination of criminal proceedings. In addition, respondents' concerns for confidentiality should be satisfied by protective orders similar to those entered in United States v. B.F. Goodrich Co., 1978-2 Trade Cases (CCH) Par. 62,389 (N.D.Cal.) and United States v. Colonial Chevrolet Corp., 1981-1 Trade Cases (CCH) Par. 64-012 (E.D. Va.).

## CONCLUSION

Petitioner, the State of Illinois, respectfully requests the Court to reverse the judgment of the Court of Appeals for the Seventh Circuit and to remand the case to the district court for further proceedings.

DATED: November 15, 1982

Respectfully submitted,

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# Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1114

# In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ILLINOIS, PETITIONER

*v.*

ABBOTT & ASSOCIATES, INC., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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## REPLY BRIEF FOR THE UNITED STATES

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In our opening brief we explained that the text and legislative history of Section 4F(b) manifest a clear congressional intent to grant state attorneys general readier access to antitrust grand jury materials than is usually accorded private parties. The respondents and their amici dispute this, largely on grounds advanced by the court of appeals and already addressed in our main brief.[1] We add the following comments in reply.

1. Although grand jury materials are in the Attorney General's files as the result of antitrust investigations, respondents nonetheless claim that such materials are not

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[1]We use the following abbreviations: "U.S. Br." for the Brief for the United States; "86 Resp. Br." for the Brief for 86 Respondents; "Clim. Br." for the Brief for Climatemp; "Undisclosed Resp. Br." for the Brief for Undisclosed Respondents; "Ill. Br." for the Brief for the State of Illinois.

"investigative files or other materials" within the meaning of Section 4F(b) of the Clayton Act, 15 U.S.C. 15f(b) (86 Resp. Br. 10-21; Clim. Br. 11-12). As shown in our opening brief (U.S. Br. 9-12), however, the terms of Section 4F(b), if given their "ordinary, contemporary, common meaning" (*Perrin* v. *United States*, 444 U.S. 37, 42 (1979)), clearly encompass the grand jury materials sought by the State of Illinois in this case. None of the arguments advanced by respondents justifies the crabbed reading they would impose on the sweeping, inclusive terms of Section 4F(b).

Respondents assert that Congress could not have intended that Section 4F(b) include grand jury materials because there is "not a shred of evidence" that Congress either knew or believed that federal criminal antitrust investigations were conducted principally through a grand jury. 86 Resp. Br. 13 n.11. See also Clim. Br. 24-25. To the contrary, however, Congress was well aware of the central role the grand jury plays in federal criminal antitrust investigations. See, e.g., *Antitrust Civil Process Act Amendment: Hearings on H.R. 39 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 34 (1975) (statement of Assistant Attorney General Kauper) (Antitrust Division rarely uses the FBI in criminal antitrust investigations because of their complexity: "We have, in most complex matters, used our own staff and not the FBI"); *Antitrust Parens Patriae Amendments: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 23 (1974) (statement of Assistant Attorney General Kauper) (grand juries are "important" and "commonly used investigatory tools," utilized when the Antitrust Division has "reason to believe a criminal violation of the antitrust laws may have occurred"). Congress clearly understood that Antitrust Division lawyers do the major portion of their criminal

investigatory work before a grand jury. The House Report on Hart-Scott-Rodino states that the Division uses grand juries "in criminal antitrust investigations." H.R. Rep. No. 94-1343, 94th Cong., 2d Sess. 5 (1976). Thus, Congress undoubtedly recognized that the expansive phrase "investigatory files or other materials" would reach grand jury materials in the files of the Antitrust Division.

Respondents counter that grand jury materials are records of the court rather than property of the Attorney General (86 Resp. Br. 16). The grand jury, however, is "not relegated by the Constitution to a position within any of the three branches of government. 'The federal grand jury is a constitutional fixture in its own right * * *.' " *United States* v. *Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977), cert. denied, 434 U.S. 825 (1977), quoting *Nixon* v. *Sirica*, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973). The grand jury is "for all practical purposes an investigative and prosecutorial arm of the executive branch." *In re Grand Jury Proceedings*, 486 F.2d 85, 89-90 (3d Cir. 1973). Respondents' custodial arguments, therefore, are simply beside the point: grand jury materials can be court records and Executive Branch investigative files simultaneously. See U.S. Br. 9-11. Indeed, the legislative history noted above shows that Congress, without caring who "owned" grand jury materials, understood (1) that the Antitrust Division regularly uses grand juries in its investigations of cartel-type offenses and (2) that its investigative files contain substantial grand jury materials. See U.S. Br. 11; Ill. Br. 16 n.4. Congress nevertheless cast Section 4F(b) in the most expansive terms. In light of Congress' clear knowledge of the content of the Attorney General's investigative files, Congress would certainly have used less inclusive language had it intended to exclude grand jury materials from the broad sweep of Section 4F(b).

Respondents repeatedly emphasize that Section 4F(b) requires the Attorney General to turn over materials to state attorneys general "upon request." Thus, they argue, Section 4F(b) was not meant to apply to grand jury materials since such materials may be turned over only pursuant to court order. 86 Resp. Br. 12 n.10, 18; Clim. Br. 12, 22; Undisclosed Resp. Br. 6. This argument fails because it ignores the proviso of Section 4F(b) that disclosure is required only "to the extent permitted by law." 15 U.S.C. 15f(b). Congress, consistent with its broad aim of bolstering state antitrust enforcement, used general, inclusive language to define the assistance the Attorney General was to provide a state. At the same time, Congress recognized that the Attorney General is not free to release grand jury materials on his own: these particular investigative files may be disclosed only upon court order. Section 4F(b) reaches the "investigative files" of the Attorney General, including grand jury materials. Those materials, however, are provided to the states only "to the extent permitted by law"[2] following judicial approval.[3]

At bottom, respondents' contention that Section 4F(b) does not, by its express terms, reach grand jury materials rests on the sort of "unarticulated * * * assumption" of which they accuse the government. 86 Resp. Br. 13.

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[2]Congress' understanding that the Attorney General's antitrust files include grand jury material and its expression of that understanding in the qualifying phrase "to the extent permitted by law" render insignificant the fact (86 Resp. Br. 19; Clim. Br. 11) that two other different disclosure statutes expressly refer to grand jury documents. Congress, of course, chooses a variety of forms of expression. Cf. 18 U.S.C. 1905 (generally barring government employees from disclosing confidential information unless "authorized by law").

[3]Because the district courts retain final authority over disclosure of grand jury materials, respondents' assertion that the case potentially raises constitutional separation of powers questions is insubstantial (86 Resp. Br. 14 n.12).

Respondents assert that, because the broad language of Section 4F(b) does not specifically include grand jury materials and because the legislative history "omitted mentioning grand jury records" (86 Resp. Br. 14), the language of the statute simply cannot be given an ordinary, straightforward reading. This Court has left no room to doubt that this method of construing a statute is improper. "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980) (footnote omitted).

2. Respondents argue that Section 4F(b) does not authorize state attorneys general to obtain access to grand jury materials on less of a showing than compelling and particularized need because Congress did not clearly evidence its intent to "repeal" Rule 6(e), Fed. R. Crim. P. (86 Resp. Br. 11), or "abrogate the particularized need standard of Rule 6(e)" (*id.* at 22). Such arguments seriously misconstrue our submission.

Rule 6(e), Fed. R. Crim. P., does not define the standard under which grand jury materials will be released to litigants. The rule merely provides that a court may permit disclosure of such materials "preliminarily to or in connection with a judicial proceeding" (Rule 6(e)(3)(C)(i)). The duty of a court faced with a request for grand jury materials under Rule 6(e) is "to weigh carefully the competing interests" to determine whether the need for disclosure "outweighs the public interest in secrecy" (*Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 223 (1979)). The Court, moreover, has emphasized that the decision "whether grand jury transcripts should be released necessarily is infused with substantial discretion" (*ibid.*). And,

while the Court has utilized a "compelling and particularized need" test in prior grand jury disclosure cases, it has carefully reserved the question whether that standard applies to public litigants such as a state attorney general.[4] Therefore, the crux of the argument advanced by the State of Illinois and the United States is that, while Section 4F(b) does not "repeal" Rule 6(e), Fed. R. Crim. P. (86 Resp. Br. 11), or "abrogate the particularized need standard" (*id.* at 22) as applied to private parties, it does represent a weighty consideration on the "need for disclosure" (441 U.S. at 222) side of the Rule 6(e) balance because it "unmistakably expresses a congressional intent to aid state attorneys general in bringing actions against those who have committed antitrust offenses" (U.S. Br. 15). In light of Section 4F(b), and without abrogating either Rule 6(e) or the case law developed under the rule, a district court should properly release grand jury materials to state attorneys general at the conclusion of federal criminal proceedings on less of a showing than compelling and particularized need. See U.S. Br. 24-28.

Respondents seek to avoid the impact of the above by contending that it rests on what petitioner and the United States "believe the law ought to be, rather than on Congress's understanding of what the law was in 1976" (86 Resp. Br. 23). Congress, respondents contend, "cannot

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[4]The Court phrased the first question before it in *Douglas Oil* as "what justification for disclosure must a private party show in order to overcome the presumption of grand jury secrecy applicable to [grand jury materials]?" *Douglas Oil Co.* v. *Petrol Stops Northwest, supra*, 441 U.S. at 213. Later in the same opinion, the Court emphasized that the holding in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), related to the showing "that a private party seeking to obtain grand jury transcripts must demonstrate" (*Douglas Oil Co.* v. *Petrol Stops Northwest, supra*, 441 U.S. at 221).

* * * be charged either with knowledge of any * * * distinction between state officials and other parties seeking disclosure, or with concurrence therein" (*id.* at 24). But, as respondents note, " 'it is always appropriate to assume that our elected representatives, like other citizens, know the law' " (*ibid.*, quoting *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979)). The Senate Report on the Antitrust Improvements Act of 1976 clearly demonstrates that Congress was well aware that the compelling and particularized need standard had been developed and applied to *private* parties. S. Rep. No. 94-803, 94th Cong., 2d Sess. 33 (1976) ("Under existing law, a private plaintiff in a treble damage antitrust action may be permitted access to grand jury testimony and documentary material upon a showing of particularized and compelling need"). Thus, Congress was undoubtedly cognizant of the vital distinction between access to grand jury materials by private litigants and the states. Section 4F(b), moreover, clearly represents a congressional determination that states should have access to such materials to the full "extent permitted by law." See U.S. Br. 15-20. The court below therefore erred in holding that this legislative policy judgment does not mandate disclosure of grand jury materials under Rule 6(e) at the conclusion of a federal prosecution on less of a showing than "compelling and particularized need."[5]

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[5]Respondents erroneously rely on the 1977 and 1979 amendments to Rule 6(e), Fed. R. Crim. P., to bolster their claim that Section 4F(b) does not alter the standard generally applicable to disclosure of grand jury materials. 86 Resp. Br. 36-37; Clim. Br. 15-16. The issue in the 1977 amendments to Rule 6(e) was direct access to grand jury materials without court order by persons assisting government attorneys. There was no reason for Congress to mention Section 4F(b) in that context, since Section 4F(b) only affects access to grand jury materials pursuant to court order. The 1979 amendments to Rule 6(e), on which respondents also rely (86 Resp. Br. 37, Clim. Br. 15), involved recording requirements, a subject not germane to the subject matter of Section 4F(b).

3. We have argued (U.S. Br. 12-24) that requiring state attorneys general to make the same showing as private parties to obtain antitrust grand jury materials would substantially frustrate Congress' purpose to enhance state antitrust enforcement.

In an attempt to avoid the evident congressional policy of disclosure that is embodied in Section 4F(b), respondents repeatedly belittle that Section and emphasize that other provisions of Title III of Hart-Scott-Rodino, especially the parens patriae provision, Section 4C (15 U.S.C. 15c), are far more important. 86 Resp. Br. 38-41; Clim. Br. 26-29. Section 4F(b), however, is not so easily denigrated. The House Report on the direct predecessor to Hart-Scott-Rodino emphasized that "[a]n extremely important benefit which would flow from" enactment of the statute was "the promotion of cooperation in antitrust enforcement between the States and the federal government." H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 5 (1975).[6] Significantly, the report clearly manifests the central importance of Section 4F(b). "Section 4F promotes parens patriae actions as a major aspect of antitrust enforcement by encouraging Federal-State cooperation." H.R. Rep. No. 94-499, *supra*, at 17.[7] The report concludes with the telling observation that the Attorney General's files are to be "made available except where specifically prohibited." *Ibid.* Thus, Congress has plainly set out the great importance it attached to Section 4F(b), and respondents' attempts to characterize the section as an afterthought are unavailing.

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[6]This 1975 House Report was relied upon in enacting the 1976 legislation. 122 Cong. Rec. 30875 (1976). See also U.S. Br. 13 n.8.

[7]Thus, since Section 4F(b) is a vital adjunct to Section 4C, it is important even under respondents' reading of the statutory scheme. See U.S. Br. 23-24.

Respondent next argue that the grand jury is not the Antitrust Division's primary tool for investigating cartel-type offenses and that, even if it is, Congress was not aware of that fact in 1976. 86 Resp. Br. 41-44; Clim. Br. 24-25. Our description of our practice (U.S. Br. 18-20) is accurate, and no court has ever disputed its accuracy.[8] Equally pertinent, Congress was well aware that the Division investigates criminal antitrust offenses primarily through grand juries. As Assistant Attorney General Kauper told Congress in 1975, the FBI is used only in the "minority of cases." *Antitrust Civil Process Act Amendment: Hearings on H.R. 39 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. 34; (1975) U.S. Br. 18-20.

Respondents also assert that there is such a substantial amount of non-grand jury material withheld in the Antitrust Division's files that, were access granted to that material, Congress' aim of greatly aiding state antitrust enforcement efforts would be fulfilled. 86 Resp. Br. 43-44; Clim. Br. 22-24. Neither Illinois nor the 45 states that support it as amici curiae, however, complain about the scope of the materials provided by the Division. Rather, this case concerns access to grand jury material. Such material not only comprises the bulk of the investigative files in criminal antitrust investigations, but it is also far and away the most valuable information in those files. There is simply no information more valuable than grand jury materials "in

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[8]Price fixing and its related criminal antitrust offenses are especially hard to investigate because they can be accomplished by infrequent, brief conversations among conspirators. Experience has shown that investigation by the grand jury, with its unique investigative powers, is generally the only successful way to detect and solve these cases. Criminal antitrust investigation is thus an exception to the general rule of FBI criminal investigation stated by Congress in reporting the 1977 amendments to Rule 6(e), Fed. R. Crim. P.; S. Rep. No. 95-354, 95th Cong., 1st Sess. 6 (1977) (86 Resp. Br. 44).

evaluating [whether to bring an antitrust action] or in bringing any [such] action." Section 4F(b), 15 U.S.C. 15f(b). Furthermore, respondents' claims that the government has improperly withheld other materials are unsound.[9]

4. The congressional intent pervading both the text and history of Section 4F(b) is materially to aid state antitrust enforcement efforts. Adoption of respondents' position would thwart this clear congressional intent. See U.S. Br. 15-20. In the final analysis, therefore, respondents argue that the text and legislative history of Section 4F(b) compel the conclusion that Congress intentionally enacted a statute well knowing that the legislation would not achieve its stated goals. 86 Resp. Br. 23-25; Clim. Br. 10-15.

To support this rather remarkable position, respondents emphasize that the Senate ultimately rejected a provision of the 1976 legislation that would have broadly abrogated grand jury secrecy concerns, permitting any litigant — state or private — to have access to federal grand jury materials at the conclusion of a federal prosecution resulting in a nolo contendere or guilty plea (86 Resp. Br. 25-34). See H.R.

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[9]Climatemp claims that the Division improperly withholds raw FBI investigative reports from state attorneys general, as well as the identity of confidential informants and attorney work product. Clim. Br. 20. This is incorrect. As the Division's Manual shows, there is no departmental ban on supplying raw FBI reports, for these reports are available to the states directly from the FBI. Department of Justice, *Antitrust Division Manual* ch. VII, § III(B)(c)(7) at VII-15 (Aub. 27, 1979). There is also no flat ban on disclosing work product. Rather, requests are considered on a case-by-case basis, and relevant, factual material in such documents, separate from recommendations or deliberations, is regularly disclosed to the states. *Id.* § III(B)(c)(8) at VII-16. The Division does refuse to disclose the names of confidential informants, because to do so would interfere with the Executive's law enforcement ability in a way that Congress never intended. Finally, to make sure that we do not violate Rule 6(e), we do not disclose without a court order any statements made to prosecutors by grand jury witnesses who sought immunity prior to testifying before the grand jury (86 Resp. Br. 43).

8532, 94th Cong., 2d Sess. § 202(1), at 25 (Senate-June 11, 1976). Respondents argue that this action evidences a congressional rejection of any special access rule for state attorneys general. This legislative history, however, cannot be construed so broadly. Section 4F(b) originated in the House, where the authoritative House Report stated that it was designed to make the Attorney General's investigatory files available to the states "except where specifically prohibited" for the express purpose of promoting "parens patriae actions as a major aspect of antitrust enforcement." H.R. Rep. No. 94-499, *supra*, at 17. As explained in our main brief, no rule of law specifically prohibits the disclosure of grand jury materials to state attorneys general (U.S. Br. 13-15). Thus, the Senate merely replaced a broad-scale grand jury access provision with a more limited provision, designed to aid state antitrust enforcement. This substitution of Section 4F(b) for proposals that would have given millions of potential private antitrust plaintiffs ready access to grand jury materials, moreover, does not deprive Section 4F(b) of its proper sphere of operation. The clear language of Section 4F(b), as well as the House Report construing it, demonstrate Congress' unmistakable intent to permit state attorneys general to have access to grand jury materials on less of a showing than compelling and particularized need.[10] Compare 86 Resp. Br. 25-28, 33-34 with U.S. Br. 23 n.16.

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[10]Respondents rely on Senator Abourezk's statement that "[u]nder existing law" the Attorney General "cannot turn over materials given in response to a grand jury demand or to a civil investigative demand" (122 Cong. Rec. 29160 (1976)). 86 Resp. Br. 29; Clim. Br. 14. As we explained in our main brief, however (U.S. Br. 22-23), Senator Abourezk was only restating the general proposition that the Attorney General may not release grand jury materials without court approval. He was not discussing the standard for disclosure. Indeed, had he been talking about the standard for disclosure, as respondents contend, the Senator's remark would have been inaccurate, for in 1976, as now, the Attorney General could "turn over" grand jury materials with court approval.

As with their legislative history arguments, there is little merit to respondents' contention (86 Resp. Br. 32-33) that since Congress prohibited the Attorney General from disclosing Civil Investigative Demand (CID) materials to state attorneys general, it could not have meant to authorize grand jury disclosure to state attorneys general on any standard except compelling and particularized need. Grand jury and CID procedures and resulting materials are different in form and purpose, and Congress could rationally distinguish between them as to access.[11]

5. Finally, respondents argue that under a lesser standard than compelling and particularized need, protective orders will be ineffective to insure the confidentiality of grand jury materials and the judicial role under Rule 6(e), Fed. R. Crim. P., will be reduced to a purely ministerial function. 86 Resp. Br. 47-50. One of the amici even suggests that judicial efficiency will be sacrificed. Cuisinarts Amicus Br. 24. These contentions should be rejected.

Reversal of the decision below will not impermissibly erode the district court's discretion under Rule 6(e), Fed. R. Crim. P. As our main brief emphasizes, the district court's role in accommodating Section 4F(b)'s policy of disclosure with the legitimate concerns furthered by grand jury secrecy "is more than ministerial" (U.S. Br. 25). While the disclosure policy embodied in Section 4F(b) makes state access to

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[11]The grand jury, for example, is used only to investigate possible criminal conduct, while the CID is used solely for civil investigations. Moreover, even under a compelling and particularized need standard, grand jury materials are more easily available to states than CID materials, whose disclosure is absolutely banned. U.S. Br. 14 n.9. Congress could rationally make access to CID materials harder than to grand jury materials, because of the need on the one hand to encourage compliance with CID's and on the other hand to add the deterrent effect of civil treble damage actions to the more serious cartel-type offenses generally investigated by use of a grand jury.

grand jury materials proper at the conclusion of federal criminal proceedings on less of a showing than compelling and particularized need, the court must still consider the relevancy of the grand jury material sought, fashion appropriate protective orders, and, in appropriate cases, deny disclosure "if a legitimate interest in grand jury secrecy is shown to require more than a protective order" (U.S. Br. 28). Contrary to the suggestion of the amicus (Cuisinarts Amicus Br. 24), there is no reason to suppose that these district court duties will be any more destructive of judicial efficiency than issuing findings and protective orders under the "compelling and particularized need" standard. Indeed, early disclosure of grand jury materials to states will substantially eliminate costly, time-consuming litigation over disclosure and will likely lead to quick settlement or trial of cases.

The arguments attacking the effectiveness of protective orders to guard against abuse of grand jury materials are equally unpersuasive. Respondents would have to rely on protective orders if disclosure were to be required under their proposed standard.[12] It is hard to fathom why protective orders will be more or less effective depending on the standard governing disclosure. And, as noted earlier, it always remains within the district court's informed discretion to decide in special cases that protective conditions will be ineffective, and that disclosure will therefore not be permitted. U.S. Br. 28.

There can be no doubt that our reading of Section 4F(b) will greatly aid effective state antitrust enforcement. There can also be little doubt that respondents' reading will not. This Court should not conclude, as did the court of appeals

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[12]Respondents repeatedly assert that the "compelling and particularized need" standard is not "burdensome" (86 Resp. Br. 17, 41 n.43).

below (Pet. App. 6a, 15a), that Congress intentionally passed a statute, touted in congressional reports as a "major aspect" of a scheme designed to grant the states access to federal investigatory files and promote federal and state cooperation (H.R. Rep. No. 94-499, *supra*, at 5, 17), well knowing that the statute conferred no such substantial benefits on the states.

For the forgoing reasons, and the reasons stated in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
*Solicitor General*

NOVEMBER 1982

DOJ-1982-11

# Amicus Brief

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Office - Supreme Court, U.S.
FILED
JUN 4 1982
ALEXANDER L. STEVAS,
CLERK

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*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## AMICI CURIAE BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS AND VIRGINIA, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF THE PETITIONER

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No. 81-1114

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ILLINOIS,

*Petitioner,*

v.

ABBOTT & ASSOCIATES, INC., ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## AMICI CURIAE BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS AND VIRGINIA, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF THE PETITIONER

## INTEREST OF THE AMICI CURIAE STATES

The *amici curiae* States have an essential interest in the matter before the Court. The States have both sovereign and proprietary interests in enforcing the antitrust laws in order to maintain an economic system free of unlawful restraints of trade. They are entitled to bring actions

under the federal antitrust laws to obtain injunctive relief and recover damages. 15 U.S.C. §§ 15, 26; *see Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260-62 (1972). State attorneys general also may sue in the names of their States as *parens patriae* to recover damages on behalf of State residents who have been injured by violations of the Sherman Act. 15 U.S.C. §§ 15c-15h. Additionally, most State attorneys general have State antitrust law enforcement responsibilities. *See, e.g.*, Md. Com. Law Code Ann. §§ 11-201 to 11-213 (1975).

The question presented by the State of Illinois — whether State attorneys general have special rights of access to federal grand jury materials in antitrust cases — has a substantial impact upon the capabilities of the States to perform a significant role in antitrust enforcement. It dramatically affects the States' ability to obtain redress, both on their own behalf and on behalf of their citizens, for antitrust violations. For these reasons the *amici curiae* States file this brief in support of the State of Illinois urging that the decision of the Seventh Circuit be reversed.

## ARGUMENT

### I.

### SECTION 4F WAS INTENDED TO PROMOTE THE CONGRESSIONAL PURPOSE OF ENHANCING STATE ANTITRUST ENFORCEMENT.

The statute involved in this matter, 15 U.S.C. § 15f, was enacted in 1976 as section 4F of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[1] The Anti-

[1] Section 4F provides:

(a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under sections 12 to 27 of this title based substantially on the same alleged violation of

trust Improvements Act was intended "to support and invigorate effective and expeditious enforcement" of the federal antitrust laws. S. Rep. No. 803, 94th Cong., 2d Sess. 1 (1976). In fact, it has been called "the most far reaching expansion in the nature of antitrust enforcement since the Clayton Act of 1914." *See* Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 Colum. L. Rev. 679 (1977).

Titles I and II of the Antitrust Improvements Act strengthen antitrust enforcement by the federal government. Title I increases the civil investigative capabilities of the Department of Justice by amending the Antitrust Civil Process Act of 1962, 15 U.S.C. §§ 1311-1314, to allow expanded use of civil investigative demands. Title II enhances the authority of the Department of Justice and the Federal Trade Commission to review the antitrust implications of proposed acquisitions, mergers and tender offers. 15 U.S.C. § 18a.

The most significant portion of the Antitrust Improvements Act, however, is found in Title III, 15 U.S.C. §§ 15c-15h, which effects a sweeping change in antitrust enforcement by dramatically expanding the role of the States. Congress saw a need to provide consumers with an effective means of redress for antitrust injuries while increasing the deterrent effect of the treble damage remedy. S. Rep. No. 803, 94th Cong., 2d Sess. 5 (1976); H.R. Rep. No. 499, 94th Cong., 1st Sess. 4-8 (1975)

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the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

(b) To assist a State attorney general in evaluating the notice or in bringing any action under sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under sections 12 to 27 of this title.

(hereinafter "House Report"). To meet that need, section 4C of Title III, 15 U.S.C. § 15c, grants State attorneys general *parens patriae* authority to bring treble damage actions on behalf of State residents injured by violations of the Sherman Act. Such *parens patriae* actions by State attorneys general would complement federal criminal and injunctive proceedings in enforcing the antitrust laws. House Report at 5. Congress supported this new enforcement remedy by adopting provisions designed to simplify consumer notice and to permit efficient methods of damage proof and distribution. 15 U.S.C. §§ 15d, 15e.

At the same time, in order to facilitate increased State antitrust enforcement activities,[2] Congress conferred upon State attorneys general new rights to receive information and assistance from the federal government. Section 4F(a) of Title III requires the Attorney General of the United States to give notice to a State attorney general of any antitrust action brought by the United States when the State official could bring a similar suit under the Clayton Act. Section 4F(b) enables State attorneys general to benefit from investigative work performed by the Justice Department by directing the Attorney General of the United States to make available, "to the extent permitted by law, any investigative files or other materials which are or may be relevant to" an actual or potential cause of action which the State may have.

Congress contemplated that an "extremely important benefit" of Title III as a whole would be "the promotion of cooperation in antitrust enforcement between the States and the federal government." House Report at 5.[3] Section

[2] During the same session, Congress authorized $30 million in federal funding for State antitrust programs to enable the States to assume their expanded antitrust enforcement role. 42 U.S.C. § 3739.

[3] Recently, Congress has reaffirmed its commitment to federal-State cooperation by codifying the Federal Trade Commission's practice of making its investigative materials available to

4F(b) in particular "reflects the . . . desire that the Federal Government *cooperate fully* with State antitrust enforcers." House Report at 17 (emphasis added).[4] To promote this cooperation, section 4F(b) provides State attorneys general with special access to information in the possession of the Department of Justice which is essential both to evaluate and to prosecute antitrust claims. As the Fourth and Ninth Circuits both held, this information includes federal grand jury materials developed by the Department of Justice in its antitrust investigations. *United States v. Colonial Chevrolet Corp.*, 629 F.2d 943 (4th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981); *United States v. B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980).

## II.

### THE INVESTIGATIVE FILES OF THE DEPARTMENT OF JUSTICE INCLUDE GRAND JURY MATERIALS.

Section 4F(b) applies broadly to "any investigative files or other materials" which are in the possession of the United States. Most Antitrust Division investigations, as Congress was aware, are conducted by using the grand jury's investigative powers. *See* H.R. Rep. No. 1343, 94th Cong., 2d Sess. 5 (1976); *Antitrust Civil Process Act Amendment: Hearings on H.R. 39 Before the Subcomm. on Monopolies & Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 34 (1975) (statement of Assistant Attorney General for Antitrust); *cf.* H.R. Rep.

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State attorneys general. *See* 15 U.S.C. § 46(f); *Fleming v. FTC*, 670 F.2d 311 (D.C. Cir. 1982); *Jaymar-Ruby, Inc. v. FTC*, 651 F.2d 506 (7th Cir. 1981).

[4] Representative Rodino, one of the named sponsors of the legislation, similarly stated the importance of increased "coordination, communication and cooperation among Federal and State antitrust enforcers . . . ." *Hearings Before the Subcomm. on Monopolies & Commercial Law of the House Comm. on the Judiciary on H.R. 12528 and H.R. 12921*, 93d Cong., 2d Sess., Ser. 43 at 12 (1974).

No. 1343, 94th Cong., 2d Sess. 22 (1976) (letter from Attorney General Edward H. Levi); American Bar Association, *Antitrust Law Developments* 233 (1975); Steinhouse, *Antitrust Grand Jury Procedure*, 23 Clev. St. L. Rev. 447 (1974). During the course of these antitrust investigations, grand jury transcripts and subpoenaed documents are kept by the Department of Justice and used to develop the Government's case. In fact, Rule 6(e) of the Federal Rules of Criminal Procedure provides that grand jury transcripts are entrusted to the custody of the Government's attorney.[5] Consequently, it should be obvious that grand jury materials are included in the Justice Department's "investigative files." Of course, even if grand jury transcripts and documents could be termed something other than "investigative files," they certainly are "other materials" in the possession of the Attorney General of the United States.

The Seventh Circuit's restrictive interpretation of the phrase "investigative files or other materials" is in clear conflict with the plain and expansive language of section 4F(b). *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 337-39 (1979). Furthermore, unless grand jury materials are included within the scope of section 4F(b), the statute will be denied any substantial effect. As this case illustrates, the information developed in an antitrust grand jury investigation often constitutes nearly the entire investigative file compiled by the Justice Department. *See In re Illinois Petition to Inspect and Copy Grand Jury Materials*, 659 F.2d 800, 801 (7th Cir. 1981). Consequently, if grand jury materials are not included within "investigative files or other materials," the federal assistance promised to State attorneys general by section 4F(b) would be meaningless. Certainly, Congress could not have intended

[5] Rule 6(e)(1) directs that grand jury transcripts "shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case."

such a result, nor do well recognized principles of statutory construction permit such an interpretation. *See, e.g., Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977); *FTC v. Manager, Retail Credit Co.*, 515 F.2d 988, 994 (D.C. Cir. 1975). The only reasonable interpretation of section 4F(b) — in accordance with both its plain language and its purpose[6] — is that grand jury materials are among the files which are to be disclosed to State attorneys general.

## III.

### IN VIEW OF THE POLICIES EMBODIED IN SECTION 4F(b), STATE ATTORNEYS GENERAL ARE ENTITLED TO ACCESS TO GRAND JURY MATERIALS UNDER RULE 6(e) WITHOUT DEMONSTRATING PARTICULARIZED NEED.

Because grand jury materials are included among the "investigative files or other materials" of the Justice Department, the Attorney General is directed to disclose them to State attorneys general "to the extent permitted by law." The "law" which is applicable to disclosure of grand jury materials is Rule 6(e) of the Federal Rules of Criminal Procedure, which permits disclosure of grand jury materials in a number of situations, including "when so directed by a court preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i).[7]

Rule 6(e) does not specify a standard for determining when grand jury materials should be made available. With

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[6] *See, e.g., Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979).

[7] The House Report on the Antitrust Improvements Act explains that investigative materials "are to be made available except where *specifically prohibited*." House Report at 17 (emphasis added). Rule 6(e), rather than being a specific prohibition against disclosure by the United States, expressly permits disclosure pursuant to its terms.

respect to *private* litigants, it has been construed to require a demonstration of "particularized need" as a prerequisite for disclosure. This showing is necessary to balance the private litigant's need for access to the materials against the public policy of continued grand jury secrecy. *See, e.g., Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211, 222-23 (1979); *United States v. Procter & Gamble Co.,* 356 U.S. 677, 682-83 (1958). The "particularized need" standard, however, is not appropriate for all public litigants. With respect to antitrust investigations by State attorneys general, section 4F(b) articulates Congress's view that public policy favors disclosure of grand jury materials contained in the Justice Department's investigative files.

Both the Attorney General of the United States and State attorneys general represent the public in antitrust matters.[8] Certainly, no public benefit is served by requiring the States to spend substantial tax dollars to duplicate investigative work already done by the federal government. Congress recognized, in enacting section 4F(b), that State attorneys general should be able to receive the fruits of prior investigations conducted by the Justice Department using its extensive powers and resources.

By requiring State attorneys general to demonstrate "particularized need" in order to obtain access to grand jury materials, the court below disregarded these public policies of federal-state cooperation and nullified the benefit that Congress intended to confer upon State attorneys general by enactment of section 4F(b). The Seventh Circuit's analysis ignores the unmistakable distinction which Congress made between counsel representing private litigants and State attorneys general whose only duty is to represent the interests of the public. Section 4F(b) and the entirety of Title III of the Antitrust

[8] Congress has recognized that "a State attorney general is an effective and ideal spokesman for the public in antitrust cases . . . whose duty is to promote the public interest." House Report at 5.

Improvements Act indicate clearly that State attorneys general now occupy a preferred position in antitrust enforcement. Indeed, that position has been termed "adjunct to that of the Attorney General himself, in the scheme of enforcement of the federal antitrust laws . . . ." *United States v. Colonial Chevrolet Corp.*, 629 F.2d at 950; *see United States v. B.F. Goodrich Co.*, 619 F.2d at 801.[9] The enactment of section 4F(b) was meaningless if State attorneys general are to be held to the standard required of private litigants to obtain grand jury materials.

Requiring a showing of particularized need by State attorneys general is illogical for an additional reason. One clearly stated purpose of section 4F(b) — to permit a State attorney general to evaluate whether to pursue a cause of action in the State's name after receiving notice pursuant to section 4F(a) — is entirely frustrated if the State attorney general must show particularized need to get access to the information necessary to make his determination. Certainly, such an evaluation of whether to expend the State's resources in litigation should be based upon all relevant information, which in most instances will consist of grand jury materials. It is doubtful, however, that a State attorney general's need to evaluate a potential cause of action prior to litigation could ever rise to the level of a particularized need. Consequently, because a State attorney general would not be able to

[9] Although in Title III Congress was most immediately concerned with *parens patriae* actions by State attorneys general, section 4F(b) applies equally to proprietary actions by States. By its terms section 4F(b) is not limited to *parens patriae* cases; it refers to all actions under sections 12 to 27 of Title 15, including proprietary actions under sections 15 and 26 as well as *parens patriae* actions under section 15c. Moreover, the legislative history of section 4F(b) amply demonstrates that it applies to both kinds of suits. *See United States v. Colonial Chevrolet Corp.*, 629 F.2d at 948 n.11; *In re Grand Jury Investigation of Armored Car Industry*, 1981-2 Trade Cas. (CCH) ¶64,182 (N.D. Ga. 1981).

evaluate the notice he receives, the statutory scheme provided in section 4F would be rendered nugatory.

In sum, to give meaning to section 4F(b) and to give effect to the congressional policy of enhancing State antitrust enforcement, State attorneys general must not be required to show particularized need as a precondition to obtaining grand jury materials. In order to avoid the needless squandering of public resources and to ensure adequate representation of the public, State attorneys general should receive broad access to all the Justice Department's investigative files, including grand jury materials, which may be relevant to the States's actual or potential causes of action under the Sherman Act. *See United States v. Colonial Chevrolet Corp.*, 629 F.2d at 950; *United States v. B.F. Goodrich Co.*, 619 F.2d at 800-01.

The States do not contend, however, that section 4F(b) entitles State attorneys general to unrestricted access to grand jury materials. Proper regard for the interests of federal law enforcement may require that grand jury materials remain confidential while the criminal matter to which they relate is pending. The States do not suggest that grand jury materials should be revealed if to do so would likely interfere with ongoing criminal proceedings. The States do suggest, however, that after the conclusion of criminal proceedings has eliminated the most significant reasons for continued grand jury secrecy, disclosure may be made under the district court's supervision.

Five reasons for grand jury secrecy have been recognized:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness

> who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

*Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 219 n.10 (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)). Once criminal proceedings have terminated, the first three policy reasons obviously no longer apply, and the concern for secrecy is diminished. *Id.* at 222. *Cf. United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940) ("[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.")

After the conclusion of criminal proceedings, two reasons for secrecy may remain. One concern is that the functioning of future grand juries will be hindered because witnesses may hesitate to testify fully and frankly if they know that their testimony may become public. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 219, 222. Clearly, because a witness's testimony may be disclosed even to a private litigant upon a sufficient showing of need, no grand jury witness can have an expectation of absolute confidentiality. Disclosure to a State attorney general obviously has much less possible impact upon this interest than does disclosure to the witness's employer or business associates or to the public at large. Because a grand jury witness has no reason to fear economic reprisals or public embarrassment from disclosure of his testimony to a State attorney general, easier access by State attorneys general to grand jury materials can have little effect upon the witness's interest in the secrecy of his testimony.

Grand Jury secrecy also is considered desirable to keep confidential the identities of persons who have been investigated but exonerated. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. at 219. Quite clearly, this Court should not presume that State law enforcement officers are any more likely than their federal counterparts to prosecute an innocent accused. Thus, each of the potential reasons for continued secrecy after the conclusion of criminal proceedings has only limited application, if any, to requests for disclosure of grand jury materials by State attorneys general. Moreover, any interests in secrecy which may in fact remain in a particular case can be fully protected by a suitable protective order tailored by the district court to the circumstances of the case to limit the use and further disclosure of the materials which a State attorney general receives. *See United States v. Colonial Chevrolet Corp.*, 629 F.2d at 951; *United States v. B.F. Goodrich Co.*, 619 F.2d at 801.

In sum, State attorneys general, rather than being required to demonstrate particularized need in each case, should be permitted access to all federal grand jury materials which may be relevant to their antitrust enforcement responsibilities. The congressional policy behind section 4F(b) is to encourage State antitrust enforcement through federal-State cooperation and information sharing. A standard for grand jury disclosure which permits State attorneys general access to grand jury materials — following conclusion of federal criminal proceedings and subject to appropriate protective orders — furthers Congress's goal of promoting State antitrust enforcement without compromising the policy of grand jury secrecy.

## CONCLUSION

For the foregoing reasons, the *amici curiae* States submit that the decision of the Seventh Circuit should be reversed.

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# Amicus Brief

# 2

Office - Supreme Court, U.S.
FILED
AUG 13 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1114

# In the Supreme Court of the United States

October Term, 1981

STATE OF ILLINOIS, PETITIONER,

*v.*

ABBOTT & ASSOCIATES, INC., ET AL., RESPONDENTS.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF OF CERTAIN APPELLANTS IN IN RE: GRAND JURY PROCEEDINGS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## BRIEF OF CERTAIN APPELLANTS IN IN RE: GRAND JURY PROCEEDINGS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

### INTEREST OF THE AMICI CURIAE

Amici are Appellants in *In re Grand Jury Proceedings*, Misc. No. 1331, *appeal pending*, No. 81-1059 (5th Cir.).[1] Amici appealed from an order of the United States District Court for the Northern District of Texas allowing the State of Texas wholesale access to federal grand jury materials generated during an antitrust grand jury investigation. On May 4, 1982, the Fifth Circuit ordered Cause No. 81-1059 held in abeyance pending the decision of this court

[1]Since the record in this proceeding is filed under seal, the specific identities of the parties filing this Amici Curiae Brief are not mentioned.

in *State of Illinois v. Abbott & Associates, Inc., et al.* Amici have a vital interest in this Court's interpretation of Section 4F(b); the decision of this Court could impact the appeal in the Fifth Circuit.

At the time the State of Texas filed its request for access to the grand jury materials, the United States had concluded its investigation *without initiating criminal or civil proceedings against any of the parties investigated.* Unlike the facts presented by the State of Illinois' petition, *no civil action has ever been filed by the State of Texas against any of the parties investigated* by the grand jury. The State's motion was based solely upon the statement that the materials requested "may be relevant" to a potential claim under Sections 4 and 4C of the Clayton Act. The State's motion contained no facts demonstrating need — certainly not the particularized and compelling need courts have required prior to authorizing release of grand jury materials. The State of Texas contended, however, that Rule 4F(b) of the Clayton Act authorized disclosure merely upon demand. Amici opposed the motion and requested an evidentiary hearing to determine the propriety of the State's request. The request for a hearing was overruled and the court entered its order allowing the State access to all grand jury materials.

If the Petitioner's interpretation of Section 4F is accepted, federal grand jury materials will be available for review by a state attorney general merely upon demand. The judicial supervision of grand jury materials would be eliminated. Indeed, the result reached by the court in the Northern District of Texas graphically demonstrates this point. The only role served by the court was ministerial.

Petitioner's interpretation of Section 4F would emasculate the safeguards on grand jury secrecy and render meaningless the provisions of Fed. R. Crim. P. 6(e). The harm which would occur to the principles of grand jury secrecy and to the grand jury institution is devastating. The harm to the parties appearing before the grand juries is manifest.[2]

## ARGUMENT

### I. SECTION 4F DOES NOT AUTHORIZE DISCLOSURE OF GRAND JURY MATERIALS MERELY UPON DEMAND.

Fed. R. Crim. P. 6(e) provides that grand jury materials may be disclosed only when directed by a court preliminarily to or in connection with a judicial proceeding.[3] Existing case authorities have incor-

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[2]This is strikingly illustrated by the posture of the individuals appealing the order of the District Court for the Northern District of Texas. For example, one of the individuals received a target letter, was falsely accused, appeared before the grand jury to vindicate himself and did so. A second individual received a grand jury subpoena, was offered immunity, accepted the grant of immunity and testified fully. Clearly, both these individuals would be subjected to personal, professional and commercial harm upon disclosure of secret grand jury materials. Further, there would be no forum available in which to defend themselves and their reputations.

[3]Fed.R.Crim.P. 6(e) provides, in part:

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.

* * *

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

porated in Rule 6(e) a requirement that disclosure be justified by a finding of "particularized and compelling need." *Dennis v. United States*, 384 U.S. 855, 872 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958). This long-standing rule was recently confirmed by this Court in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979). Contrary to Petitioner's argument, Section 4F of the Clayton Act[4] neither expressly nor impliedly altered existing law governing grand jury secrecy.

### A. Section 4F Did Not Place State Attorneys General On a Par With United States Attorneys.

Unable to rely successfully upon statutory language and in the absence of supporting legislative history, Petitioner has resorted to a superficially attractive, but incorrect policy argument to support an interpretation of Section 4F giving state attorneys general a right to obtain access to secret grand jury materials merely upon demand. The underlying theme of Petitioner's arguments is that Congress, by passage of the Hart-Scott-Rodino Antitrust Improve-

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[4]Sec. 4F. (a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

(b) To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.

ments Act of 1976, intended to place state attorneys general on a par with United States Attorneys. Petitioner therefore argues that unless its right to inspect grand jury materials without any showing of particularized or compelling need is upheld, this federal-state antitrust partnership goal would be frustrated.

Far from declaring a partnership, the Hart-Scott-Rodino Antitrust Improvements Act carefully limited the role of states in federal antitrust enforcement. For example, Congress limited *parens patriae* authority to claims on behalf of natural persons, and only for violations of the Sherman Act. Earlier versions of the Act would have authorized *parens patriae* actions for *all* antitrust claims, including claims under the Robinson-Patman Act and §7 of the Clayton Act. In addition, claims for "general damage" to the economy of the states were eliminated. *See, e.g.*, S. Rep. No. 803, 94th Cong., 2d Sess. 43-44 (1976); H.R. Rep. No. 499, 94th Cong., 1st Sess. 9-10, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572.

The Hart-Scott-Rodino Antitrust Improvements Act also amended the Antitrust Civil Process Act of 1962. The Amendments prohibit disclosure to any person of materials and testimony obtained in response to a civil investigative demand ("CID"). Materials produced in response to CIDs can be furnished to a grand jury. If Petitioner's argument is accepted, grand jury materials obtained through CIDs could not be disclosed, while materials obtained through grand jury compulsory process would be subject to disclosure. Congress did not intend such a result.

Rather than the sweeping mandate suggested by Petitioner and the United States, the Hart-Scott-

Rodino Antitrust Improvements Act was no more than a limited legislative response to a perceived loophole in antitrust enforcement: the inability to maintain *parens patriae* actions. Kintner, Griffin, Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 Geo. Wash. L. Rev. 1, 19-20 (1977).

The 1977 amendments to Rule 6(e) demonstrate the fallacy in Petitioner's argument. Petitioner has urged this Court to accept the argument that Congress, without making any reference in Section 4F or its legislative history, *intended* to expand the provisions of Rule 6(e) to allow access by state attorneys general to grand jury materials. The 1977 amendments to Rule 6(e), however, demonstrate the contrary. Congress redrafted the Court's proposed language to specify, with particularity, the persons to whom access would be permitted. 8 Moore's Federal Practice 6-14 (1981). The Congressional action demonstrates that if Congress intended state attorneys general to have preferential access to grand jury materials, it would have stated this explicitly. State attorneys general were not named by Congress and Congress made clear that standards for disclosure of grand jury materials remained unchanged by the amendment to Rule 6(e). *See* S. Rep. No. 354, 95th Cong., 1st Sess. 8 (1977), *reprinted in* [1977] U.S. Code Cong. & Ad. News. 527, 532.

Congress has recognized that state attorneys general have a significant role to play in antitrust enforcement policy. However, Congress did not equate state attorneys general to United States Attorneys,

nor did Congress provide state attorneys general access to grand jury materials without the required showing of "particularized and compelling need."

**B. Even If Section 4F Could Be Interpreted to Relate to Grand Jury Materials, Section 4F Did Not Change Existing Law Requiring "Particularized and Compelling Need" to Justify Disclosure of Grand Jury Materials.**

Central to Petitioner's arguments are assumptions (1) that Congress *intended*, even if it did not articulate such intent, to alter the existing body of law governing disclosure of grand jury materials and (2) that Congress resolved the policy interests in grand jury secrecy to allow access by a state attorney general *unless* parties opposing disclosure demonstrate compelling reasons to withhold disclosure. (Pet.Br.24-26).[5] However, neither the Petitioner nor the United States can point to any statutory provision or legislative history which articulates this congressional intent.

The clear language of Section 4F allows for disclosure only "to the extent permitted by existing law." The Seventh Circuit correctly concluded that existing law remained unchanged, and a state attorney general must demonstrate "particularized need" prior to obtaining disclosure of grand jury materials. *In Re State of Illinois Petition to Inspect and Copy Grand Jury Materials*, 659 F.2d 800, 808 (7th Cir. 1981).

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[5]Petitioner, and the United States, argue that the term "investigative files and other materials" in Section 4F encompasses grand jury materials. There is nothing in the statutory language or legislative history to support this view. Amici believe that Respondents' Brief thoroughly discusses this issue and makes clear without further discussion in this Brief that the term "investigative files and other materials" does not include grand jury materials.

In *In Re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24 (2nd Cir. 1981), the Second Circuit reached a similar conclusion, following the well-reasoned opinions of Judge Cabranes in the district court and of the Seventh Circuit. In *Cuisinarts, Inc.*, the court concluded that the "particularized need" standard was a recognition of the important policy considerations underlying the concept of grand jury secrecy, and that the only logical conclusion was that Congress did not change existing law *sub silentio*. *Id.* at 34-35. Indeed, commentators have rejected as unfounded and unwise the interpretation of Section 4F urged by Petitioner. Kintner, Griffin, Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 Geo. Wash. L. Rev. 1 (1977); *accord*, Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 Colum. L. Rev. 679 (1977).

Petitioner's argument is substantially the same argument advanced by the United States: because no rule of law specifically prohibits disclosure of grand jury materials to state attorneys general, the language "to the extent permitted by existing law" means that materials are to be made available "except where specifically prohibited." This argument ignores the well developed body of law which prohibited disclosure unless a party seeking disclosure had demonstrated a "particularized and compelling need." *See, e.g., Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223-24 (1979); *see also Dennis v. United States*, 384 U.S. 855, 872 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958). Furthermore, this re-

quirement for particularized need existed for both public and private parties. Indeed, a state stands in no different shoes than a private litigant in seeking disclosure of secret grand jury materials. *Texas v. United States Steel Corporation*, 546 F.2d 626 (5th Cir. 1977).[6] In *United States Steel Corporation*, the Fifth Circuit addressed, and rejected, the argument that a state should be held to a lesser standard than a private party to obtain disclosure of grand jury materials. The Court correctly concluded that a state is held to the same standard as a private party. The necessity for grand jury secrecy is unaffected by whether the party seeking disclosure is a public party. The Fifth Circuit reasoned:

> [3] The State underrates the importance of and misconceives the reasons for the cloak of grand jury secrecy: although several reasons exist, the one most pertinent to this case is the desire to create a sanctuary, inviolate to *any* intrusion except on proof of some special and overriding need, where a witness may testify, free and unfettered by fear of retaliation. When the witness obtains his own transcript, this ground of grand jury secrecy remains unaffected. The State concedes as much in admitting that, absent a showing of particularized need, it could not hope to obtain civil discovery from an individual witness merely because he had obtained the transcript of his own testimony. By this concession the State recognizes that requiring such disclosure would in some degree compromise the effectiveness of the grand jury. In such a case the issue, of course, would be whether this diminishment of effectiveness was warranted in the particular instance by some special consideration: particularized need. We con-

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[6]*See also United States v. Sobotka*, 623 F.2d 764 (2d Cir. 1980); *In re Holovachka*, 317 F.2d 834 (7th Cir. 1963); *In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962); *In re Grand Jury Proceedings*, 483 F.Supp. 422 (E.D. Pa. 1979).

> clude that similar arguments justify the appellants' present reliance on this policy to protect them from discovery in the absence of a showing of particularized need.

546 F.2d at 629-30.

Indeed, this necessity was recognized by this Court in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 (1958):

> [W]e start with a long established policy that maintains the secrecy of the grand jury proceedings in the federal courts. ... The reasons are varied. One is to encourage all witnesses to step forward and testify freely without fear of retaliation. The witnesses in antitrust suits may be employees or even officers of potential defendants, or their customers, their competitors, their suppliers. The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow. *This 'indispensable secrecy of grand jury proceedings' ... must not be broken except where there is a compelling necessity.* There are instances when that need will outweigh the countervailing policy. *But they must be shown with particularity.*

356 U.S. at 681-82. (emphasis added; citations and footnotes omitted); *see also Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979).

Even the United States recognizes that limits must be placed upon the ability of states to request grand jury materials. The United States has asked this Court to accept Petitioner's argument that Congress *intended* to relax the standards for disclosure, but at the same time asks this Court to place *limits* on any disclosure. For example, the United States recognizes that disclosure prior to termination of a grand jury proceeding would create an unreasonable risk of un-

dermining federal law enforcement. (See U.S. Br. 26 n.19).[7]

This "limitation" sought by the United States graphically demonstrates the illogical position advanced by both Petitioner and the United States. If the Petitioner's position is correct, the limitation suggested by the United States would not be appropriate because Congress has resolved the policy interests and purportedly authorized disclosure at any time without a showing of particularized need. Petitioner's argument is clearly wrong. If, as Petitioner suggests, the purpose of the Hart-Scott-Rodino Antitrust Improvements Act was to bolster effective antitrust enforcement, this purpose would be frustrated by a judicial decree permitting states preferential access to grand jury materials without a showing of particularized and compelling need. This access would result in interference with ongoing federal enforce-

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[7]The position taken by the United States conflicts with the position of the Antitrust Division of the Department of Justice as expressed in the Manual of the Antitrust Division which provides:

> "When the Division's investigative files requested by a state attorney general contain grand jury materials or other data referring to grand jury materials, it is the Division's position that such disclosure is prohibited without a court order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. While there may be some dispute whether Section 4F(b) creates an exception to the application of Rule 6(e), the Division interprets Rule 6(e) as covering grand jury materials sought by state attorneys general under Section 4F. This interpretation is justified and warranted by the objectives embodied in the grand jury secrecy rule and such an interpretation is in the best interests of protecting the efficacy and integrity of grand jury investigations as a law enforcement tool."

U. S. Dept. of Justice, Antitrust Division Manual VII-13 (First Issue, August 27, 1979).

ment proceedings, a result which the United States recognizes is inconsistent with effective antitrust enforcement.

Finally, the standard of disclosure suggested by the United States would make the judicial supervisory function over grand jury materials nonexistent. The United States argues that grand jury materials should be furnished to a state merely upon a showing of "relevancy." The United States fails to suggest, however, how a court could make a judicial determination of "relevancy" in a factual situation such as that faced by Amici. The State of Texas merely alleged, in the district court, that the materials "may be" relevant to a potential cause of action under Sections 4 and 4C of the Clayton Act. No other information was provided, nor could it have been provided. Such a standard for disclosure is totally unworkable. The court could not limit production of grand jury materials to materials directly pertinent to the need for disclosure, or otherwise fashion appropriate protective orders to safeguard the interest of continued grand jury secrecy. A court could not exercise discretion if disclosure is warranted merely upon demand.

### C. The Language Of Section 4F And Its Legislative History Disclose Congressional Intent To Preserve Grand Jury Secrecy.

The language of Section 4F states that "any investigative files or other materials" shall be made available to the state attorney general requesting disclosure only "to the extent permitted by law." 90 Stat. 1396. Fed.R.Crim.P. 6(e), and cases interpreting

Rule 6(e), prohibit disclosure of grand jury materials except upon order of a court after a showing of "particularized and compelling need." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979). Thus, even if Section 4F is interpreted to include grand jury materials in "investigative files or other materials," disclosure may be allowed only upon a showing of "particularized and compelling need." The legislative history of Section 4F confirms this conclusion.

The statement during the final Senate debate of Senator Abourezk, the floor manager for the bill, described the purpose of Section 4F:

> The Section specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. Under existing law, he cannot turn over the materials given in response to a grand jury demand or to a civil investigative demand. Therefore the section is limited by existing law to cases where materials were turned over voluntarily.

122 Cong. Rec. 29144, 29160 (1976).

Remarkably, the Petitioner and the Amici Curiae States contend that Congress intended, even if not stated, to change existing law and abrogate the principles of grand jury secrecy. This argument is all the more remarkable because there is no mention in the legislative history of this Congressional intent. "Implying" this intent absent any evidence is neither logical nor permissible. Indeed, Congress could have expressed easily its intent to do so. To accept Petitioner's argument, this Court would have to accept the proposition that Congress has made a specific provision for confidentiality in one section of the Hart-Scott-Rodino Antitrust Improvements Act, and

"implicitly" directed the contrary in a similar provision in another section of the Act.[8] Such a conclusion is illogical. This conclusion would result in the anomaly that materials produced in response to a civil investigative demand, which could then be furnished to the grand jury, would be immune from disclosure while the very same materials, if submitted directly to a grand jury, would be subject to disclosure merely upon demand. The inescapable conclusion is obvious: Congress never intended to alter the existing law which bars disclosure of grand jury materials absent a showing of particularized and compelling need. If, as the Petitioner argues, Congress intended state attorneys general to have access to all materials which would assist a state in antitrust enforcement, Congress would have authorized disclosure of materials obtained by means of civil investigative demands. Instead, Congress made it clear that materials obtained through the use of civil investigative demands could not be disclosed without the permission of the producer or witness. 15 U.S.C. §1313(c)(3) (Supp. 1977). If there is one consistent element in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the other Acts of Congress,[9] it is that Congress intended to protect the confidentiality of materials obtained through compulsory process — including grand jury materials. The possible disruption of the grand jury process is

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[8]No one argues that Congress gave state attorneys general access to materials gathered pursuant to a Civil Investigative Demand.

[9]As indicated above in this Brief, the specific consideration and identification of persons who should have access to federal grand jury documents in the amendment of Rule 6(e) is a clear statement by Congress of its intention.

evident if Petitioner's argument is accepted. A recipient of a grand jury summons, or a voluntary witness, could delay production of materials or giving testimony, seeking assurance from a court of confidentiality or request that the government issue a civil investigative demand.

## II. TO INSURE THE EFFECTIVENESS OF GRAND JURIES AND IN FAIRNESS TO THOSE APPEARING BEFORE A GRAND JURY, GRAND JURY SECRECY MUST BE PRESERVED.

The grand jury procedure is unique in American jurisprudence. The procedure allows interrogation of a witness without the benefit of counsel. There is no court or opposing advocate to protect a witness from abusive or misleading questions. There is no opportunity for confrontation of witnesses or for explication of matters presented to the grand jury. However, such procedure is considered a valuable law enforcement tool and is widely used today. The effectiveness of the grand jury process is possible only because of the longstanding, well guarded traditions of grand jury secrecy.

This Court has recognized time and time again that the effectiveness of the grand jury process depends on maintaining grand jury secrecy.[10] Section 4F of the Clayton Act is now being advanced to destroy

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[10] "We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Company v. Petrol Stops Northwest*, 441 U.S. 211 (1979).

grand jury secrecy by providing federal grand jury materials to state attorneys general based on a mere demand.

Release of federal grand jury materials to state attorneys general necessarily would constitute uncontrollable release to an unidentifiable group of persons. Additionally, once in the hands of state attorneys general, such grand jury materials would be sought through discovery processes by others involved in litigation concerning the subject matter of the investigation. There is no doubt that the release of materials to state attorneys general would result in disclosure generally. If secrecy of grand jury proceedings is not preserved, then parties would no longer cooperate with the grand jury process. The risks would be simply too great.

Further, fairness to the parties appearing before a grand jury dictates that the materials generated as a result of the grand jury proceeding be maintained as secret. As an example, in the case pending before the Fifth Circuit, if grand jury materials are released, the potential for harm is great. The Justice Department called as witnesses representatives of various companies whose positions ranged from executive to salesman. Some were called apparently merely to educate the attorneys for the government about procedures in the industry. Some were informed they were targets of the investigation. Some testified without immunity and some testified with immunity. Questions by attorneys for the government during the grand jury proceedings probably were leading, could easily unjustifiably have implied wrongdoing by a witness or others. The investigation resulted in no action by the federal government. The release of

grand jury materials in such circumstances could result in great damage to wholly innocent companies and individuals simply by association and cooperation in the grand jury investigation. Fairness to such companies and individuals requires a ruling from this Court that Section 4F does not authorize disclosure of grand jury materials except under Rule 6(e) protections.

## CONCLUSION

If Petitioner's arguments are accepted, the concept of grand jury secrecy would be destroyed and thus, the effectiveness of the grand jury procedure would be impaired. Such a ruling by this Court would not be in the interests of the effective administration of justice. Section 4F should be held to preserve "existing law" and the requirement of Rule 6(e) of a "particularized and compelling need" showing to justify disclosure of grand jury documents should be reaffirmed.

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# Amicus Brief

# 3

Office - Supreme Court, U.S.
FILED
AUG 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1114

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ILLINOIS,

*Petitioner,*

—V.—

ABBOTT & ASSOCIATES, INC., ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF OF AMICUS CURIAE CUISINARTS, INC. IN SUPPORT OF RESPONDENTS

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## Interest of Amicus Curiae

Cuisinarts, Inc. ("Cuisinarts") has a compelling interest in the adjudication of the issue presented by this case because it is the respondent in a case presently pending in this Court which raises the identical legal issue in a significantly different factual context. *Connecticut* v. *Cuisinarts, Inc., petition for cert. filed,* 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595).[1] Cuisinarts respectfully urges the Court to consider the following factors in reaching its determination.

Like the respondents in the present case, Cuisinarts was the subject of a grand jury antitrust indictment and prevailed in the district court and the court of appeals in a proceeding commenced by state attorneys general to obtain access to all grand jury materials.[2] The United States District Court for the District

[1]Cuisinarts is filing this brief in support of respondents' position upon the consent of the parties. *See* Supreme Court Rule 36.2. The letters indicating the consent of the petitioner and the respondents are being filed concurrently with the Clerk of the Court.

[2]Cuisinarts is a Connecticut corporation in the business of distributing houseware products to retail stores in the United States. Its principal product is the food processor distributed under the trademark "Cuisinart."

Cuisinarts was indicted September 17, 1980 by a grand jury sitting in the District of Connecticut. The one-count felony indictment charged Cuisinarts and unnamed alleged co-conspirators with fixing, maintaining, and stabilizing the retail price of Cuisinart food processors between 1974 and 1979 in violation of §1 of the Sherman Act, 15 U.S.C. §1. As the Second Circuit observed, this was the first federal criminal prosecution for alleged vertical price-fixing in many years, certainly since the penalty for violating the Sherman Act was increased to a felony in 1974. *In re Grand Jury Investigation of Cuisinarts, Inc., supra,* 665 F.2d at 29.

At the April 1-3, 1981 meeting of the Section of Antitrust Law of the American Bar Association, only months after the conclusion of the criminal proceedings against Cuisinarts, William F. Baxter, Assistant Attorney General, Antitrust Division, publicly doubted whether the type of alleged conduct for which Cuisinarts was indicted is even anticompetitive, much less appropriate for criminal prosecution:

> I do not think that vertical price maintenance is uniformly harmful. I think there are some circumstances in which it is a positively useful, pro-competitive tool.
>
> . . . .
>
> Now, because I cannot, in this area, as in a number of other areas, set forth a crisp code that gives clear guidance to people as to what they should and should not be doing, I don't think it is appropriate to bring criminal cases.

50 Antitrust L.J. 151, 154 (1982).

of Connecticut and the United States Court of Appeals for the Second Circuit properly rejected the states' argument that §4F(b) of the Clayton Act, 15 U.S.C. §15f(b) (hereinafter "§4F(b)"), alters Fed.R.Crim.P. 6(e) *sub silentio* so as to grant state attorneys general unfettered access to secret grand jury materials on demand, without demonstrating any need. Both courts held that state attorneys general may not gain access to grand jury materials unless they show the compelling and particularized need required by Fed.R.Crim.P. 6(e) and this Court's controlling decisions thereunder. *In re Grand Jury Investigation of Cuisinarts, Inc.*, 516 F.Supp. 1008 (D. Conn.), *aff'd*, 665 F.2d 24 (2d Cir. 1981) (Kaufman, J.).

Cuisinarts urges affirmance of the decision of the Seventh Circuit at bar. Cuisinarts' rights would be directly and adversely affected by a reversal in this case, since the district court in *Cuisinarts* denied the states' petition without prejudice to a renewed application for disclosure upon a showing of compelling and particularized need. 516 F.Supp. at 1023. Thus, a reversal here would enable the states to renew their application for grand jury disclosure to the district court and thereby effectively avoid the decision of the Second Circuit.

Equally important, *Cuisinarts* presents a factual situation which, while different from the present case, is likely to recur in future cases involving the application of §4F(b). The Department of Justice investigation of Cuisinarts began as a civil matter. Thus, substantially all of the 26,000 documents subpoenaed from Cuisinarts by the grand jury which returned the indictment had previously been obtained from Cuisinarts by the Department of Justice pursuant to a Civil Investigative Demand, 15 U.S.C. §§1311-14 (516 F.Supp. at 1018 n.13), which protects such documents from disclosure by the Department of Justice, 15 U.S.C. §1313(c)-(e). These same documents were thereafter produced to the grand jury directly by the Department of Justice.

Additionally, two of the states which sought access to the grand jury materials are plaintiffs in civil suits against Cuisinarts with the ability to seek production of relevant documents under

Fed.R.Civ.P. 34 and otherwise utilize the discovery provisions of the Federal Rules of Civil Procedure. In the wake of the indictment, numerous private plaintiffs filed purported class actions against Cuisinarts and others seeking treble damages and other relief under the federal antitrust laws. Among these actions were two parens patriae actions commenced by Massachusetts (on October 30, 1980) and New Jersey (on February 20, 1981). 516 F.Supp. at 1011-12. When Massachusetts and New Jersey filed their complaints, they simultaneously served Cuisinarts with very substantial discovery demands pursuant to Fed.R.Civ.P. 33 and 34. 665 F.2d at 30 n.9. In addition, Connecticut, Maryland, and North Carolina addressed investigative demands to Cuisinarts under authority of their respective state statutes, *id.*, and Cuisinarts complied therewith.

At the conclusion of the criminal proceedings against Cuisinarts on December 19, 1980, fifteen state attorneys general moved the district court during the period January-March 1981 for an order allowing them to inspect and copy all grand jury materials, including transcripts, documents, and exhibits gathered or generated pursuant to the grand jury investigation which resulted in the indictment. 516 F.Supp. at 1012 n.7. The states expressly predicated their application upon Fed.R.Crim.P. 6(e), but nonetheless claimed that §4F(b) entitled them to access to grand jury materials as of right. 516 F.Supp. at 1012. The states accordingly specifically declined to demonstrate any need for access to the grand jury materials they were seeking. 516 F.Supp. at 1021-22 n.16. By memorandum from the bench on March 30, 1981 and written opinion dated June 8, 1981, the district court denied petitioners' motion in all respects "without prejudice to a renewed application for disclosure upon a showing of compelling and particularized need" as mandated by Fed.R.Crim.P. 6(e). 516 F.Supp. at 1023.

On November 19, 1981, the United States Court of Appeals for the Second Circuit unanimously affirmed. The court of appeals held that the statutory phrase "investigative files or other materials" excludes grand jury materials in the possession of the Department of Justice. The court declared that since grand jury

materials "remain the records of the courts, and courts must decide whether they should be made public," it would be "curious logic indeed" to find such materials to be part of the Justice Department's files. 665 F.2d at 31. Since the policy of grand jury secrecy is "older than our Nation itself." *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 399 (1959), the court of appeals found it impossible to conclude that Congress intended the generalized terminology "investigative files or other materials" to embrace grand jury materials "without thoroughly debating the issue and without making specific provision for it." 665 F.2d at 31.

Further, the court of appeals, following "well-settled principles of statutory construction" and beginning with the statutory language itself, *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980), found the limiting language of §4F(b)—"to the extent permitted by law"—dispositive against the states' application. 665 F.2d at 32. The court of appeals explained that Fed.R.Crim.P. 6(e)(3), as consistently interpreted by this Court, mandates a compelling showing of particularized need before access to secret grand jury materials may be granted. *Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. 211, 222 & n.12 (1979); *Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 400; *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 683 (1958). This rule, the court of appeals observed, is premised upon the overriding policy of protecting the integrity of the grand jury process, safeguarding against possible retaliation directed at witnesses, protecting the innocent, and encouraging free testimony. 665 F.2d at 32-33.

The court of appeals considered and specifically rejected the states' contention that §4F(b) implicitly overrules the traditional disclosure standards of Fed.R.Crim.P. 6(e) and the controlling decisions of this Court thereunder. The court found it significant that Congress, aware of that Rule and those decisions, gave no statutory indication that it intended to create a new, lesser standard for disclosure to state attorneys general. 665 F.2d at 33-34. Moreover, the court was "confident that if Congress had intended that district courts should no longer consider requests by state

attorneys general to be governed by the particularized need standard, it would have made its intention crystal clear in light of its awareness of the issue." 665 F.2d at 34.

Finally, the court of appeals agreed with the Seventh Circuit's conclusion in this case, *In re State of Illinois Petition to Inspect and Copy Grand Jury Materials*, 659 F.2d 800 (7th Cir. 1981), and expressly rejected the states' contention that with respect to the issue of grand jury secrecy they somehow occupy a "preferred" position in the scheme of private federal antitrust enforcement. 665 F.2d at 35. The court of appeals endorsed the district court's reasoning that while the Hart-Scott-Rodino Antitrust Improvements Act of 1976, of which §4F(b) is a part, accomplishes certain specific remedial goals in antitrust enforcement which augment the role of state attorneys general, there is nothing in that Act's language or legislative history to suggest that Congress intended to or did alter the existing standard of grand jury secrecy—a decision reinforced by numerous federal court decisions holding public entities to the same disclosure standard of compelling and particularized need as private parties. 665 F.2d at 35-36.

## Summary of Argument

Section 4F(b) does not refer to grand jury materials and disclosure of grand jury materials is not within its scope. The statutory phrase "investigative files or other materials" refers only to files belonging to the executive branch, viz., the Department of Justice, which is charged with the primary responsibility for investigating possible antitrust violations. It does not encompass grand jury documents, subpoenas, and transcripts, which are and remain records of the district court which empanels the grand jury and must decide whether and under what circumstances to release its products. Thus, §4F(b) is inapplicable by its terms to grand jury materials and, under well-settled principles of statutory construction, it would be improper to impart to the statute a drastic legislative purpose in derogation of preexisting Fed.R.Crim.P. 6(e) and contrary to the plain meaning of §4F(b). *See* Point I, *infra*.

Even if the phrase "investigative files" were to be construed to encompass grand jury materials, §4F(b) nonetheless permits their disclosure only "to the extent permitted by law." The "law" governing disclosure of grand jury materials, Fed.R.Crim.P. 6(e) and the substantial body of judicial decisions thereunder, was well known to Congress when it passed §4F(b) and requires any party seeking such disclosure for purposes of civil litigation, like petitioner, to demonstrate compelling and particularized need. *See* Point II, *infra*.

The position espoused by petitioner would effectively convert the district courts into rubber stamps in derogation of their lawful duty under Fed.R.Crim.P. 6(e) to exercise discretion in reviewing applications for disclosure of grand jury materials. This is because petitioner's interpretation of §4F(b), while paying lip service to the requirement of a court order for disclosure under Rule 6(e), leaves the courts little if anything over which discretion could be exercised. *See* Point IIIA, *infra*.

Petitioner's position, if adopted, would also lead to an anomalous result: materials originally obtained by the Department of Justice pursuant to a Civil Investigative Demand ("C.I.D.") but never shown to a grand jury would enjoy a higher level of secrecy than materials originally subpoenaed by a grand jury or shown to a grand jury after having been obtained pursuant to a C.I.D. Significantly, the Department of Justice, by presenting C.I.D. documents to a grand jury, could unilaterally dilute the confidentiality accorded such documents by Congress in 15 U.S.C. §1313(c)-(e). Such a process might improperly encourage the commencement of grand jury investigations into essentially civil matters and divert grand juries from their lawful function (*see* discussion *infra* at 17-18) and would be repugnant to the crucial, time-honored policy of safeguarding the workings of the grand jury. *See* Point IIIB, *infra*.

Finally, the result advocated by the United States, a species of "intermediate" disclosure standard, does not accord with Rule 6(e) standards and is not supported by §4F(b) itself. Specifically, the government's proposal that states be able to obtain grand

jury materials at the conclusion of criminal proceedings upon a showing of "relevance" ignores the fact that (a) neither petitioner here nor petitioners in *Cuisinarts* ever attempted to show any "relevance" of the materials they sought and (b) "relevance" cannot be litigated in the first instance unless either grand jury materials are disclosed or the district courts are embroiled in burdensome in camera review of those materials. In short, the government's position is legally unsound, impracticable, and represents an improper attempt to achieve via litigation certain perceived transitory public policy goals which Congress has not seen fit to implement. *See* Point IV, *infra.*

## ARGUMENT

### I.

### The plain language of §4F(b) does not include grand jury materials and does not overrule or amend Fed.R. Crim.P. 6(e).

Both petitioner (Br. for Pet. at 13-16) and the government (Br. for U.S. at 9-10) argue that the statutory language of §4F(b)[3]—"investigative files or other materials"—includes grand jury materials because (a) such materials are maintained in the "files" of the Justice Department and (b) the "practical realities" of federal antitrust enforcement make grand juries the principal tool of antitrust investigations. These contentions are meaningless, however, in the face of the language of §4F(b) itself, which does not even *mention* grand jury materials. Since the "time-honored policy of secrecy has been the most essential, indeed indispensable, characteristic of grand jury proceedings," *In re Grand*

[3]Section 4F(b) of the Clayton Act, 15 U.S.C. §15f(b), provides as follows:

> To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.

*Jury Investigation of Cuisinarts, Inc., supra,* 665 F.2d at 28, it is inconceivable that Congress could have intended a wholesale change in grand jury disclosure standards without so stating in concrete and specific terms.

Petitioner advances an exceedingly narrow view: because investigations into possible criminal antitrust violations customarily involve a grand jury, the grand jury is little more than an arm of the prosecutor. That is not the law. Numerous decisions of this Court and the courts of appeals confirm the independent nature of the grand jury and the important supervisory function of the district courts with respect to access to materials of the grand jury.

Ultimate control over access to grand jury materials has long been entrusted solely to the courts. As this Court admonished in *Pittsburgh Plate Glass Co., supra.*

> [*A*]*ny* disclosure of grand jury minutes is covered by Fed Rules Crim Proc 6(e) promulgated by this Court in 1946 after approval of Congress. In fact, the federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it.

360 U.S. at 398-99 (emphasis added; footnotes and citations omitted). *See also United States* v. *Spangelet,* 258 F.2d 338, 340 (2d Cir. 1958).

There are at least two compelling reasons why control over grand jury materials is committed to the courts. First, as this Court explained in *Pittsburgh Plate Glass Co., supra,* there is " 'a long-established policy' of secrecy older than our Naton itself. The reasons therefor are manifold and are compelling when viewed in light of the history and modus operandi of the grand jury." 360 U.S. at 399 (citations omitted).

Because grand jury proceedings are invested with this "indispensable secrecy," *Procter & Gamble Co., supra,* 356 U.S.

at 682, the question whether to release grand jury materials necessarily involves a careful balancing process which is uniquely judicial. "[T]he court's duty in a case of this kind is to weigh carefully the competing interests in light of the relevant circumstances and the standards announced by this Court." *Douglas Oil Co., supra,* 441 U.S. at 223.

The second compelling reason for court control over grand jury materials is that grand jury testimony and documentary evidence are products of the court's power. As this Court cautioned in *Brown* v. *United States,* 359 U.S. 41 (1959):

> A grand jury is clothed with great independence in many areas, but *it remains an appendage of the court,* powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witnesses to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so.

359 U.S. at 49 (emphasis added). The Court reaffirmed that basic principle in *United States* v. *Calandra,* 414 U.S. 338, 346 n.4 (1974). Indeed, a grand jury may be discharged by the court and its deliberations terminated. Fed.R.Crim.P. 6(g); *Petition of A & H Transportation, Inc.,* 319 F.2d 69, 71 (4th Cir.), *cert. denied,* 375 U.S. 924 (1963).

Thus, whatever direction the prosecutor gives the grand jury, and whatever use the prosecutor makes of the grand jury as an investigative tool, it is an instrument of the judicial branch and ultimate control over its work product is accordingly vested in the courts. This Court has confirmed that "grand jury minutes and transcripts are not the property of the Government's attorneys, agents or investigators. . . . Instead those documents are records of the court." *Procter & Gamble Co., supra,* 356 U.S. at 684-85 (Whittaker, J., concurring); *accord, United States* v. *Penrod,* 609 F.2d 1092, 1097 (4th Cir. 1979), *cert. denied,* 446 U.S. 917 (1980). *See also* n.4, *infra.*

The Second Circuit, in *In re Grand Jury Investigation of Cuisinarts, Inc., supra,* 665 F.2d at 31-32, correctly applied these basic principles and concluded that the statutory phrase "investigative files or other materials" does not include grand jury materials. Judge Kaufman wrote:

> The grand jury, while maintaining independence in many areas, is fundamentally an arm of the judiciary. *See Levine* v. *United States,* 362 U.S. 610, 617, 80 S.Ct. 1038, 1043, 4 L.Ed. 2d 989 (1960). It is not simply a tool or instrument of the executive or legislative branch. *See United States* v. *Fisher,* 455 F.2d 1101, 1105 (2d Cir. 1972). Indeed, grand jury proceedings remain the records of the courts, and courts must decide whether they should be made public. Justice Whittaker felicitously expressed this view in his concurring opinion in *United States* v. *Procter & Gamble Co.*: "[G]rand jury minutes and transcripts are not the property of the Government's attorneys, agents, or investigators. . . . Instead, those documents are records of the court." 356 U.S. 677, 684-85, 78 S.Ct. 983, 987-988, 2 L.Ed.2d 1077 (1958).
>
> Since grand jury materials are traditionally the records of the Judicial Branch, it would be curious logic indeed to deduce from this premise that such materials are included within the Department of Justice's files or materials. . . . [W]e cannot conclude that Congress—without thoroughly debating the issue and without making specific provision for it—intended general terminology such as "investigative files or other materials" to embrace grand jury materials.[4]

In sum, §4F(b) applies solely to the "investigative files or other materials" of the executive branch. Because grand jury materials are subject to the control of the judicial branch, they

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[4]The Second Circuit also exposed an inconsistency between the government's position taken in this case and *Cuisinarts,* that grand jury materials are "investigative files" of the Justice Department, and the government's view expressed elsewhere that grand jury materials are *not* records of the Justice Department. 665 F.2d at 31 n.10, *citing Valenti* v. *United States Department of Justice,* 503 F.Supp. 230 (E.D. La. 1980).

may not be disclosed by the Attorney General without court review pursuant to the standards of Fed.R.Crim.P. 6(e). Section 4F(b) does not reflect any contrary intention of Congress.[5]

## II.

## Section 4F(b) does not alter the requirement of Fed. R.Crim.P. 6(e) that grand jury materials be disclosed only upon a showing of compelling and particularized need.

The relevant decisions of this Court make it clear that Rule 6(e)(3)(C)(i)[6] specifically prohibits granting access to grand jury materials unless the requesting party demonstrates a compelling and particularized need. *Douglas Oil Co., supra,* 441 U.S. at 222 & n.12; *Pittsburgh Plate Glass Co., supra,* 360 U.S. at 399-400; *Procter & Gamble Co., supra,* 356 U.S. at 683. As the Court most recently declared in *Douglas Oil Co., supra,* 441 U.S. at 222:

> Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy,

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[5]This conclusion is confirmed by the government's own conduct both in this case and *Cuisinarts*. If, as petitioner and the government contend, the language "investigative files or other materials" encompasses grand jury materials, the mandatory language of §4F(b) would *require* the Attorney General to turn over such materials to a state upon request.

The Attorney General declined to do so. Instead, he advised petitioner that "we are *unable* to supply you with other materials at this time, since those materials are *subject to the requirements of grand jury secrecy* set forth in Rule 6(e) of the Federal Rules of Criminal Procedure and, consequently, *may not be disclosed to you* absent a court order." Joint Appendix at 9 (emphasis added). *See also In re Grand Jury Investigation of Cuisinarts, Inc., supra,* 665 F.2d 24, Joint Appendix at A20.

[6]In relevant part, Rule 6(e) provides as follows:

> (e) Recording and Disclosure of Proceedings.
>
> . . . .

*(Footnote continued on following page)*

> and that their request is structured to cover only material so needed. Such a showing must be made even when the grand jury whose transcripts are sought has concluded its operations. . . . (footnote omitted).

Both petitioner (Br. for Pet. at 25-26) and the government (Br. for U.S. at 15) argue, contrary to this established standard, that the official status of a state attorney general, coupled with the existence of §4F(b), renders the "compelling and particularized need" standard inapplicable and mandates instead substantially automatic disclosure to a state attorney general upon request.

This theory ignores both the absence of any statutory authority in §4F(b) for a drastically altered standard and the consistent line of cases holding *all* parties, state or private, to the "compelling and particularized need" standard. *See United States* v. *Sobotka*, 623 F.2d 764, 768 (2d Cir. 1980) (denying access to grand jury materials to the Grievance Committee of the Connecticut state bar); *Texas* v. *United States Steel Corp.*, 546 F.2d 626, 630-31 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977) (same; Texas attorney general); *In re Grand Jury Proceedings*, 483 F.Supp. 422, 424 (E.D. Pa. 1979) (same; Pennsylvania attorney general). The "compelling and particularized need" standard has

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*(Footnote continued from previous page)*

> (2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision *shall not disclose matters occurring before the grand jury*, except as otherwise provided for in these rules. . . .
>
> (3) Exceptions.
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> . . . .
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> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
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> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding.
>
> . . . .
>
> If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made *in such manner, at such time, and under such conditions as the court may direct*. (Emphasis added.)

also been applied to federal agencies. *See In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1190-92 (9th Cir. 1981), *cert. granted sub nom. United States* v. *Sells Engineering, Inc.*, 102 S.Ct. 2034 (U.S. May 3, 1982) (No. 81-1032) (United States Attorneys working on civil matters are not relieved of showing compelling and particularized need); *In re Grand Jury Investigation*, 414 F.Supp. 74 (S.D.N.Y. 1976) (same; SEC personnel).

In each of these cases, the lower courts recognized that in particular circumstances a public litigant may well be able to make a sufficient showing to justify disclosure under the established Fed.R.Crim.P. 6(e) standard. However, what the courts consistently *refuse* to do is precisely what petitioner urges in this case: to make a sweeping change in the *standard itself* based solely on the identity of the party seeking disclosure, without regard for the important policy interests served by protecting the secrecy of grand jury materials and thus the secrecy of the grand jury's deliberations.[7]

In short, even assuming arguendo that Congress meant §4F(b) to refer to grand jury materials, when it limited disclosure "to the extent permitted by law" it explicitly incorporated what it knew to be the existing disclosure standards of Rule 6(e) and the cases decided thereunder. Congress did not enunciate any different standard. As the Second Circuit explained in *In re Grand Jury Investigation of Cuisinarts, Inc., supra*, 665 F.2d at 33-34:

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[7]Petitioner strenuously urges this Court to heed the canon of statutory construction that requires meaning be given to each word used by Congress and that a statute not be interpreted in a manner which renders one part of it inoperative. Br. for Pet. at 19-20, *citing Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979) and *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979).

This suggestion is well taken and disposes of petitioner's principal argument. Unless the statutory phrase "to the extent permitted by law" reflects Congress's intention to limit disclosure of grand jury materials in harmony with Rule 6(e) and the cases decided thereunder, the statutory phrase has no meaning whatever. Certainly, petitioner has not suggested what Congress could have meant by those words other than the law embodied in Rule 6(e) and its interpretative cases.

Section 4F(b), in the most direct language, requires that files be made available only "to the extent permitted by law." At the time this section was enacted, the applicable law included both Rule 6(e) and the Supreme Court decisions requiring particularized need. *See Dennis* v. *United States, supra; Pittsburgh Plate Glass Co.* v. *United States, supra; United States* v. *Procter & Gamble Co., supra.* To argue, as do the States, that Congress intended district courts to apply only the language of Rule 6(e)(3)(C)(i) and to ignore the particularized need standard when deciding a section 4F(b) request for disclosure denigrates, perhaps unintentionally, Congress's legal acumen.

Certainly, it may be presumed that a knowledgeable body of legislators, dealing extensively with an innovative approach to antitrust enforcement, was well aware that a Supreme Court decision interpreting a statute is at least as much law as a procedural rule promulgated by the Supreme Court and approved by Congress. Furthermore, the phrase "to the extent permitted by law" on its face does not appear to us to provide a clear statement that Congress contemplated establishing a new, more liberal law of disclosure. The contrary seems to be more reasonable.[8]

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[8]Indeed, the Second Circuit found, based upon the legislative history of the Hart-Scott-Rodino Act, that Congress was aware of the particularized need standard and did not intend to deviate from that standard by passing §4F(b):

> When considering the Hart-Scott-Rodino Act Congress was well aware of the particularized need standard. The Senate version of the Act, of which section 4F(b) was a part, included a provision, §202(*l*), that would have afforded all civil antitrust plaintiffs access to grand jury materials after completion of the federal case. S. Rep. No. 803, 94th Cong. 2d Sess. 110 (1976). The Report refers directly to the particularized need standard and the discretion of a trial judge to grant or deny disclosure. *Id.* at 33. Since the Senate upheld this standard by rejecting the provisions, it would be unlikely that Congress intended section 4F(b) to alter that standard without explicitly stating so. We recognize that a change in a statute during the course of enactment is not necessarily a dispositive indication of Congressional intent, but we do believe express rejection of a specific provision may be significant. *See Fox* v. *Standard Oil Co.*, 294 U.S. 87, 96, 55 S.Ct. 333, 337, 79 L.Ed. 780 (1935).

665 F.2d at 34 n.21.

Simply stated, the radical departure from the time-honored, legislatively created, and judicially mandated policy of grand jury secrecy which petitioner urges at bar is found nowhere in the language of §4F(b). To the contrary, Congress directed that whatever disclosure might occur pursuant to §4F(b) be limited "to the extent permitted by law" and thereby incorporated the "law" embodied by Rule 6(e) and repeatedly declared in the decisions of this Court. That law does not countenance the disclosure of grand jury materials to a state attorney general—or anyone else not specified in Rule 6(e) itself—on anything less than a showing of compelling and particularized need. No such showing has been attempted let alone made either in the case at bar or in *Cuisinarts*, and the judgment of the court of appeals should be affirmed.[9]

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[9]The petitioner's position and even more pointedly the government's advocacy of an "intermediate" disclosure standard for state attorneys general (Br. for U.S. at 24-28) reflect an attempt to achieve through the judicial process what Congress has not seen fit to legislate. In substance, petitioner and the government ask this Court to rewrite §4F(b) so as to substitute what those litigants wish Congress had said for what Congress actually said.

The courts invariably reject such invitations. "Arguments that the statute is unwise or could have been better drafted should be addressed to the legislature, not the Court." *Branch* v. *Du Bois*, 418 F.Supp. 1128, 1131 (N.D. Ill. 1976). To hold otherwise would contravene the principle that courts should refrain from legislating judicially. *See Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 263-64, 271 (1975). And where a principle like grand jury secrecy is deeply rooted in common law, any statute in derogation of that policy must be strictly construed. *Cf. American Casualty Co.* v. *M.S.L. Industries, Inc.*, 406 F.2d 1219, 1221 (7th Cir. 1969); *Halpern* v. *Rosenbloom*, 459 F.Supp. 1346, 1352 (S.D.N.Y. 1978), *citing Thompson* v. *Thompson*, 218 U.S. 611, 618 (1910).

This is particularly true at bar because Rule 6(e) long antedated §4F(b). This Court has cautioned against statutory interpretation that allows a subsequent statute to repeal an earlier one by implication. *See, e.g., Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 189-90 (1978) (repeal must be manifest, or earlier and later statutes must be irreconcilable). Because §4F(b) does not expressly repeal Rule 6(e) or the controlling decisions thereunder and because §4F(b) and Rule 6(e) are in no sense irreconcilable, this Court should avoid any holding that would effectively repeal or vitiate Rule 6(e).

## III.

**Petitioner's position, if adopted, would strip the district courts of their lawful discretion under Fed.R. Crim.P. 6(e) and would conflict with the statutory secrecy accorded documents produced pursuant to civil investigative demands.**

### A. Petitioner's Interpretation of §4F(b) Would Leave the District Courts Nothing Over Which to Exercise Their Discretion Under Rule 6(e).

It is settled that the district courts have the power and obligation under Rule 6(e)(3)(C)(i) to exercise their discretion in deciding requests for disclosure of grand jury materials such as the one at bar. *Pittsburgh Plate Glass Co., supra,* 360 U.S. at 399; *Douglas Oil Co., supra,* 441 U.S. at 223; *United States* v. *Spangelet, supra,* 258 F.2d at 340; *In re Brooke's Petition,* 229 F. Supp. 377, 378 (D. Mass. 1964).

The rule of judicial discretion is bottomed upon the need to balance the paramount concerns of grand jury secrecy against possible need for disclosure. As enumerated by the Second Circuit, these concerns include:

> [T]he interest of the government against disclosure of its investigation of crime which may forewarn the intended objects of its inquiry or inhibit future witnesses from speaking freely; the interest of a witness against the disclosure of testimony of others which he has had no opportunity to cross-examine or rebut, or of his own testimony on matters which may be irrelevant or where he may have been subjected to prosecutorial brow-beating without the protection of counsel; the similar interests of other persons who may have been unfavorably mentioned by grand jury witnesses or in questions of the prosecutor; protection of witnesses against reprisal; and the interests and protection of the grand jurors themselves.

*In re Biaggi,* 478 F.2d 489, 491-92 (2d Cir. 1973), *citing Pitts-*

*burgh Plate Glass Co., supra,* 360 U.S. at 405 (Brennan, J., dissenting).

Even where the grand jury is no longer sitting and the criminal proceedings have concluded, there is great need to guard against the breach of grand jury secrecy for various reasons: to safeguard future grand jury deliberations by encouraging free and untrammeled disclosures by persons who have information with respect to the commission of crimes and to protect the reputations of the innocent who appeared before the grand jury from revelation of the fact that they were under investigation and from the expense of standing trial where there is no probability of guilt. *Douglas Oil Co., supra,* 441 U.S. at 219 n.10; *Procter & Gamble Co., supra,* 356 U.S. at 682 (institution of the grand jury "might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow"); *accord, In re Grand Jury Investigation of Cuisinarts, Inc., supra,* 665 F.2d at 32-33; *Baker* v. *United States Steel Corp.,* 492 F.2d 1074, 1076 n.2 (2d Cir. 1974); *United States* v. *Sobotka, supra,* 623 F.2d at 767 (showing of necessity for grand jury materials must be made even after the grand jury has completed its investigation); *In re April 1956 Term Grand Jury,* 239 F.2d 263, 271-72 (7th Cir. 1956) ("[W]e hold that the safeguard of secrecy, in the interest of the public, continues even after the grand jury has completed its efforts . . .").

Moreover, because of the unusual latitude which a prosecutor has in a grand jury proceeding, *In re Biaggi, supra,* 478 F.2d at 491-92, there is a need to protect against both unwarranted intrusions into the privacy and due process interests of witnesses and the diversion of the grand jury's proper role of investigating crimes to civil discovery purposes. In ex parte grand jury proceedings, witnesses may be subjected to almost boundless questioning without benefit of counsel, and neither the right of cross-examination nor the right to introduce rebuttal evidence is present. The policy of grand jury secrecy and the requirement that a compelling and particularized need be shown in order to breach that secrecy are safeguards which reduce the harm that might otherwise result from the public dissemination of information ob-

tained in the course of grand jury proceedings, where constitutional protections are largely absent. *See, e.g., In re Blue Ribbon Frozen Food Corp.*, 414 F.Supp. 399, 400 (D. Conn. 1976); *United States* v. *White Ready-Mix Concrete Co.*, 449 F.Supp. 808, 810-11 (N.D. Ohio 1978).

By limiting disclosure of grand jury materials in situations where, like the case at bar, the materials are sought for purely civil purposes, the law discourages abuse of the grand jury process as a tool for civil discovery and a springboard into possible treble damage actions. Such misapplication of the grand jury's legitimate function not only subverts society's interest in the vigorous investigation of crimes, *In re April 1956 Term Grand Jury, supra,* 239 F.2d at 271-72, but also prejudices parties from whom civil discovery has been sought in the guise of a grand jury proceeding by denying them the greater protections which surround civil discovery proceedings. *See Procter & Gamble Co., supra,* 356 U.S. at 683 (use of grand jury to elicit evidence in a civil case "would be flouting the policy of the law"); *In re Grand Jury Investigation No. 78-184, supra,* 642 F.2d at 1190 (denying assistant United States Attorneys in civil division access as of right to grand jury materials to avoid "irresistibly encourag[ing] use of the grand jury as a tool of civil discovery"); *Robert Hawthorne, Inc.* v. *Director of Internal Revenue,* 406 F.Supp. 1098, 1118 (E.D. Pa. 1976) ("Where the grand jury is used by the government as a cover to obtain records for a civil investigation, the grand jury process is subverted and relief must be granted"); *United States* v. *Doe,* 341 F.Supp. 1350, 1351 (S.D.N.Y. 1972) (grand jury must be directed from its inception to criminal matters).

The petitioner and the government concede that the district courts are required under Rule 6(e) to exercise discretion in balancing the principle of grand jury secrecy against any possible interests served by disclosure. *See* Br. for Pet. at 25; Br. for U.S. at 15. However, their argument that Congress, via §4F(b), has legislatively determined all disclosure issues in favor of state attorneys general necessarily vitiates the very district court discretion they profess to recognize. They have suggested to this

Court that under §4F(b) all that remains of district court discretion is a handful of ministerial functions such as signing possible protective orders and conducting superficial assessments of relevance. Such functions are a far cry from the appropriate, lawful duties of the district courts under the cited teachings of this Court.

### B. Petitioner's Position Would Anomalously Elevate Materials Produced Pursuant to Civil Investigative Demands to a Higher Level of Secrecy Than That Afforded Materials Subpoenaed by a Grand Jury.

Petitioner's argument for expansive disclosure of secret grand jury materials also ignores the Civil Investigative Demand provisions of the Antitrust Civil Process Act, 15 U.S.C. §1313(c)-(e),[10] and fails to present any persuasive rationale for the result-

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[10]Title 15, U.S.C., §1313 (c)-(e), provides, in relevant part:

(c)(3) Except as otherwise provided in this section, while in the possession of the custodian, *no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material, answers, or transcripts,* and, in the case of any product of discovery produced pursuant to an express demand for such material, of the person from whom the discovery was obtained, by any individual other than a duly authorized official, employee, or agent of the Department of Justice. Nothing in this section is intended to prevent disclosure to either body of the Congress or to any authorized committee or subcommittee thereof.

. . . .

(d)(1) Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative or regulatory agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case, grand jury, or proceeding as such attorney determines to be required. Upon the completion of any such case, grand jury, or proceeding, *such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the record of such case or proceeding.*

. . . .

*(Footnote continued on following page)*

ing disparity in confidential treatment of C.I.D. materials and grand jury materials.

Section 1313(c)-(e) creates a strict regimen of confidentiality applicable to materials produced in response to Civil Investigative Demands. It requires that such materials be maintained by a Justice Department custodian and not disclosed without the consent of the source thereof (subsection (c)(3)); that any such materials used in a judicial proceeding but not given over "into the control of such court, grand jury, or agency" be returned to the custodian (subsection (d)(1)); and that upon conclusion of such proceeding, any materials which have not "passed into the control of any court, grand jury, or agency, be returned upon request to the source thereof" (subsection (e)).

Thus, §1313(c)-(e) establishes a system for maintaining confidentiality of materials obtained via Civil Investigative Demands which is closely analogous to the strictures imposed by Rule 6(e) in respect of grand jury materials. Indeed, the provisions of §1313(d)(1) and (e), drawing a distinction between C.I.D. materials which have been given over to a grand jury and those which have not, effectively equate confidentiality under §1313 with secrecy under Rule 6(e).

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*(Footnote continued from previous page)*

> (e) If any documentary material has been produced in the course of any antitrust investigation by any person pursuant to a demand under this Act and—
>
> (1) any case or proceeding before any court or grand jury arising out of such investigation, or any proceeding before any Federal administrative or regulatory agency involving such material has been completed, or
>
> (2) no case or proceeding, in which such material may be used, has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation, the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) *which has not passed into the control of any court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.* (Emphasis added.)

The district court in *In re Grand Jury Investigation of Cuisinarts, Inc., supra,* 516 F.Supp. at 1017 n.13, found the existence of the C.I.D. confidentiality provisions extremely persuasive in determining the scope of §4F(b) in that case where, as noted above, substantially all of the 26,000 Cuisinarts documents shown to the grand jury were originally obtained from Cuisinarts by the Department of Justice through a Civil Investigative Demand:

> In both the 1962 Act and *Hart-Scott-Rodino,* Congress made clear that the investigative materials collected by the Justice Department should remain confidential. Petitioners offer no principled basis for believing that grand jury materials should be treated with less of a concern for confidentiality than is required for CID's. In the relevant statutory provisions, Congress never indicates any intention of treating grand jury materials with a lower degree of confidentiality. Indeed, *the fact that Congress did not establish specific guidelines for the secrecy of grand jury materials may have resulted from its belief that the pre-existing Rule 6(e), Fed.R.Crim.P., had settled that issue of law sufficiently.* Thus the legislative scheme which Congress created to protect CID materials from disclosure suggests how Congress intended that grand jury materials be preserved.

516 F.Supp. at 1018 n. 13 (emphasis added).

The Second Circuit likewise refused to conclude that Congress, in the same Act which restricts disclosure of C.I.D. materials, would have simultaneously diluted the grand jury secrecy standards of Rule 6(e) without saying so forthrightly:

> The Hart-Scott-Rodino Act, in addition to its *parens patriae* provisions, amended the Antitrust Civil Process Act to increase the Department of Justice's civil investigative demand powers. *See* 15 U.S.C. §§1311-14 (1976) (amended 1979). Although civil investigative demand materials would aid state enforcement of federal antitrust laws, the Act man-

> dates that such materials be kept strictly confidential. 15 U.S.C. §1313 (1976) (amended 1980). Such a requirement was imposed to safeguard the rights of individuals under investigation and to protect witnesses from retaliation. . . . It would be curious indeed to read section 4F(b) as if it were intended to liberalize Rule 6(e)'s disclosure requirements and not to interpret it also to make the civil investigative restriction less strict—particularly because similar policies support secrecy in both instances. Such a reading, however, would be quite difficult to reconcile with the strictures imposed on disclosure of civil investigative demands incorporated in the same act as section 4F(b). Logic would dictate that section 4F(b), therefore, cannot be interpreted as establishing a new, more liberal law of disclosure.

*In re Grand Jury Investigation of Cuisinarts, Inc.*, *supra*, 665 F.2d at 34 n.22 (citation omitted).

Thus, it is clear that the historic doctrine of grand jury secrecy under Rule 6(e) is at least as compelling as the confidentiality provisions of the Antitrust Civil Process Act. It would be anomalous, therefore, to conclude, as the government urges (Br. for U.S. at 14 n.9), that materials produced in response to a Civil Investigative Demand are entitled to a higher degree of confidentiality than those produced in connection with grand jury proceedings, to which the law has traditionally accorded the utmost secrecy.

It can be expected that future cases will continue to involve, as did *Cuisinarts*, the presentation to grand juries of documents earlier obtained by the Department of Justice pursuant to Civil Investigative Demands. If petitioner's view of §4F(b) were correct, two anomalies would result in any such case. First, a document obtained pursuant to a C.I.D. but never shown to a grand jury would enjoy a higher level of secrecy than a document subpoenaed by the grand jury in the first instance. Second, a document obtained pursuant to a C.I.D. but shown to a grand jury would be disclosed in response to a §4F(b) request despite the

fact that such disclosure is absolutely barred by 15 U.S.C. §1313-(c)-(e).[11]

In view of the compelling and long-established principles underlying the secrecy of grand jury proceedings, and absent clear direction from Congress, this Court should reject the proposition offered by petitioner and should affirm the judgment of the court of appeals.

## IV.

### The government's suggestion of an "intermediate" disclosure standard based upon an assessment of "relevance" would impose an undue burden on the district courts.

The government (Br. for U.S. at 27-28) suggests an "intermediate" standard for disclosure of grand jury materials to the states under §4F(b): disclosure upon "a showing that the requested materials are relevant to an actual or anticipated state antitrust action. . . ." This position is flawed for two reasons.

First, as discussed in Point II, *supra*, nothing in the language of §4F(b) supports the creation of such a reduced standard for disclosure. Indeed, neither petitioner at bar nor petitioners in *Cuisinarts* premised their request for disclosure upon any demonstration of relevance of the requested grand jury materials; petitioners in *Cuisinarts* expressly declined to attempt to do so. 516 F.Supp. at 1021-22 n.16.

[11] In *In re Grand Jury Investigation of Cuisinarts, Inc., supra*, the district court found that the states' application was barred by the strictures of 15 U.S.C. §1313 *separate and apart* from the question of disclosure under §4F(b):

> It would appear that those documents which were first produced pursuant to a CID and later presented to the grand jury are subject to the strict confidentiality requirements of 15 U.S.C. §1313, and thus, under §1313(c), are available to Justice Department personnel only. Because a "substantial" number of the grand jury documents which the states now seek were, in fact, first produced pursuant to a CID, the states' disclosure request would appear to be barred, to that extent, by the terms of 15 U.S.C. §1313.

516 F.Supp. at 1019 n. 13.

Second, in view of the wide-ranging, ex parte nature of grand jury proceedings (*see* discussion at 17, *supra*), relevance of grand jury materials cannot be blithely assumed. To the contrary, relevance must be adjudicated and such adjudication could be reached only in one of two ways: through adversarial litigation or in camera inspection of the materials in question. The former alternative is wholly unacceptable because it would necessitate disclosure of the materials to the adverse parties in the first instance. In light of the overriding principles of grand jury secrecy, such disclosure would be unthinkable.

The latter alternative is equally unacceptable. Busy district courts should not be placed in the position of having to conduct in camera inspections of grand jury materials in order to assess relevance on an item-by-item basis. In *Cuisinarts*, for example, the district court would have to review some 50,000 documents as well as the transcripts of testimony of twenty-three witnesses (665 F.2d at 29) in order to make informed rulings as to relevance. Especially in the absence of a demonstrated compelling and particularized need for such materials, that task would be virtually impossible and plainly undesirable.

In *Dennis* v. *United States*, 384 U.S. 855 (1966), this Court considered the question of in camera inspection of grand jury materials by trial courts in the context of finding possible inconsistencies between grand jury and trial testimony of witnesses. The Court's language in *Dennis* is instructive at bar in evaluating the government's proposed disclosure standard:

> Trial judges *ought not to be burdened* with the task or responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. . . . In our adversary system, it is enough for judges to judge.

384 U.S. at 874-75 (emphasis added).

## CONCLUSION

**Amicus Curiae, Cuisinarts, Inc., requests that the Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit.**

Dated: August 13, 1982

Respectfully submitted,

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I. JOSEPH GONTOWNIK
GOLENBOCK and BARELL
645 Fifth Avenue
New York, New York 10022

# Docket Sheet

| NO. 81-1114-CFX | TITLE Illinois, Petitioner<br>v.<br>Abbott & Associates, Inc., et al. |
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| DOCKETED | COURT |
|---|---|
| Dec. 15, 1981 | United States Court of Appeals for the Seventh Circuit |

| DATE | PROCEEDINGS AND ORDERS |
|---|---|
| | Counsel for Petitioner: Stephen Paul Juech, Thomas M. Genovese |
| | Counsel for Respondents: Michael B. Nash, Jerold S. Solovy, Arthur C. Chapman, John E. Burke, Mark Crane Bryson P. Burnham, Tom W. Stonecipher, Thomas E. Lindley (Over) |
| Dec. 15, 1981 | Petition for writ of certiorari filed. (Record filed) |
| Dec. 18, 1981 | Brief, amici curiae, of the States of Alabama, Alaska, et al. filed. |
| Jan. 11, 1982 | Brief for the U. S. in support of petition filed. |
| Jan. 15, 1982 | Order extending time for respondent Abbott & Associates to file a response to the petition until Feb. 12, 1982. |
| Jan. 18, 1982 | Brief of respondents Climatemp, Inc. and Victor Comforte in opposition filed. |
| Feb. 10, 1982 | Order further extending time to file a response to the petition for respondent Abbott & Associates, until Feb. 22, 1982. |
| Feb. 22, 1982 | Brief for the respondents in opposition filed. |
| Feb. 24, 1982 | DISTRIBUTED. 3-19. |
| Feb. 16, 1982 | Application of "Undisclosed Respondents" for an order to keep indentities of certain respondents held in camera filed. |
| Mar. 2, 1982 | DISTRIBUTED. 3-5. (Above application). |
| March 8, 1982 | The application of "undisclosed respondents" for an order to keep identities of certain respondents held in camera presented to Stevens, J., and by him referred to the Court is GRANTED. |
| March 22, 1982 | Petition GRANTED. |
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| Apr. 21, 1982 | Order extending time to file the joint appendix and petitioner's brief on the merits until June 4, 1982. |
| June 4, 1982 | Brief, amici curiae, for the States of Alabama, Alaska, et al. filed. |
| June 7, 1982 | Joint appendix filed. |
| June 7, 1982 | Brief for the petitioner filed. |
| June 7, 1982 | Brief for the United States filed. |
| June 22, 1982 | Motion of the Solicitor General for divided argument filed. |
| | (Over) |

81-1114

*Title*

No.

| DATE | PROCEEDINGS AND ORDERS |
|---|---|
| | Counsel for respondents Cont'd: Robert F. Ward, |
| June 24, 1982 | Order extending time to file the respondents' brief on the merits until July 28, 1982. |
| June 28, 1982 | The motion of the Solicitor General for divided argument is GRANTED. |
| July 19, 1982 | Order extending time to file the respondents' brief on the merits until Aug. 13, 1982. |
| Aug. 9, 1982 | Brief for Undisclosed Respondents filed. |
| Aug. 13, 1982 | Brief, amici curaie, of Certain Appellants in Re: Grand Jury Proceedings filed. |
| Aug. 13, 1982 | Brief for respondents Climatemp, Inc. and Victor Comforte filed. |
| Aug. 14, 1982 | Brief amicus curiae, Cuisinarts, Inc, in support of respondents filed. |
| Aug. 14, 1982 | Brief for the intervenors-respondents, Inland Heating & Air Conditioning Company and Lawrence Krueger filed. |
| Aug. 16, 1982 | Brief of respondents Abbott & Associates, Inc., et al. filed. |
| Sept. 15, 1982 | CIRCULATED. |
| Nov. 8, 1982 | Reply brief for the United States filed. (D). |
| Nov. 5, 1982 | Motion of respondents for divided argument filed. |
| Nov. 15, 1982 | The motion of respondents for divided argument is DENIED. |
| Nov. 16, 1982 | Reply brief for the petitioner filed. (D). |
| Nov. 17, 1982 | Motion of the Solicitor General to permit Richard G. Wilkins, Esquire, to present oral argument pro hac vice. |
| Nov. 29, 1982 | The motion of the Solicitor General to permit Richard G. Wilkins, Esquire, to present oral argument pro hac vice is GRANTED. |
| Nov. 29, 1982 | ARGUED. |